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IN THE

# Supreme Court of the United States

KHALED EL-MASRI,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the pleading-stage dismissal, on the basis of the evidentiary state secrets privilege, of a suit seeking compensation for petitioner's unlawful abduction, arbitrary detention, and torture by agents of the United States?

## PARTIES TO THE PROCEEDINGS

The petitioner in this case is Khaled El-Masri. The respondent is the United States of America.

The following parties were named as defendants in the district court but were not parties to the proceedings in the court of appeals: Former Director of Central Intelligence George Tenet (sued in his individual capacity), Premier Executive Transport Services, Inc., Aero Contractors Limited, Keeler and Tate Management LLC, and Does 1-20.

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Khaled El-Masri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 479 F.3d 296 (4th Cir. 2007) and reprinted in the Appendix at 21a. The opinion of the district court is reported at 437 F. Supp. 2d 530 (E.D. Va. 2006) and reprinted in the Appendix at 1a.

## JURISDICTION

The court of appeals entered its judgment on March 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves application of the state secrets privilege, which has not been codified by any Act of Congress. Petitioner's underlying complaint raises claims under the Fifth Amendment to the United States Constitution and the Alien Torts Statute, 28 U.S.C. 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

## STATEMENT OF THE CASE

### A. Abduction, Detention, and Release

Petitioner Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia, detained incommunicado, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania.

Mr. El-Masri's ordeal began in the final days of 2003, when he traveled by bus from his home near Neu Ulm, Germany, to Skopje, Macedonia. App. 59a, 60a (El-Masri Decl. ¶¶ 1-2, 6). After passing through several international border crossings without incident, Mr. El-Masri was detained at the Serbian-Macedonian border because of alleged irregularities with his passport. App. 60a, 61a (*Id.* ¶¶ 7-9). He was interrogated by Macedonian border officials, then transported to a hotel in Skopje. App. 62a, 63a (*Id.* ¶¶ 11-14).[1]

Over the course of three weeks' detention, Mr. El-Masri was repeatedly interrogated about alleged contacts with Islamic extremists and was denied contact with the German Embassy, an attorney, or his family. App. 64a, 65a, 66a (*Id.* ¶¶ 18-24). He was told that if he confessed to Al-Qaeda membership, he

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[1] Subsequent to his release in May, 2004, Mr. El-Masri was able to identify the hotel from website photographs as the Skopski Merak and to identify photos of the room where he was held and of a waiter who served him food. App. 63a, 64a (*Id.* ¶¶ 14, 17).

would be returned to Germany. App. 65a (*Id.* ¶ 21). On the thirteenth day of confinement, Mr. El-Masri commenced a hunger strike, which continued until his departure from Macedonia. App. 66a (*Id.* ¶ 24).

After twenty-three days of detention, Mr. El-Masri was videotaped, blindfolded, and transported to an airport, where he was turned over to U.S. agents. App. 66a (*Id.* ¶¶ 25-27). There he was beaten, stripped naked, and thrown to the ground. App. 66a, 67a (*Id.* ¶ 28). A hard object was forced into his anus. *Id.* When his blindfold was removed, he saw seven or eight men, dressed in black, with hoods and black gloves. App. 67a, 68a (*Id.* ¶ 29). He was placed in a diaper and sweatsuit, subjected to full sensory deprivation,[2] shackled, and hurried to a plane, where he was chained spread-eagled to the floor. App. 67a, 68a (*Id.* ¶¶ 30-31). He was injected with drugs and flown to Baghdad, then on to Kabul, Afghanistan.[3] App. 68a (*Id.* ¶¶ 32-34).

Upon arrival in Kabul, Mr. El-Masri was kicked and beaten and left in a filthy cell. App. 68a, 69a (*Id.* ¶¶ 35-36). There he would be detained in a CIA-run prison for more than four months. He was interrogated several times in Arabic about his alleged terrorist ties. App. 70a, 71a (*Id.* ¶¶ 43-46). American officials participated in his interrogations. App. 72a (*Id.* ¶ 49). All of his requests to meet with a representative of the German government were refused. App. 71a (*Id.* ¶ 46).

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[2] This included being blindfolded, having his ears plugged with cotton and then covered with headphones, and finally having a bag placed over his head. App. 67a (*Id.* ¶ 30).

[3] This itinerary is confirmed by public flight records. App. 68a (*Id.* ¶ 34). At some point prior to his departure, an exit stamp was placed in Mr. El-Masri's passport, confirming that he left Macedonia on January 23, 2004. App. 80a (*Id.* ¶ 81).

In March, Mr. El-Masri and several other inmates commenced a hunger strike. App. 71a, 72a (*Id.* ¶ 47).[4] After nearly four weeks without food, Mr. El-Masri was brought to meet with two American officials. App. 72a (*Id.* ¶ 50). One of the Americans confirmed Mr. El-Masri's innocence but insisted that only officials in Washington could authorize his release. App. 73a (*Id.* ¶ 52).[5] Mr. El-Masri continued his hunger strike. On the evening of April 10, Mr. El-Masri was dragged from his room by hooded men and force-fed through a nasal tube. App. 73a, 74a (*Id.* ¶ 55).[6]

On May 16, Mr. El-Masri was visited by a uniformed German speaker who identified himself as "Sam." App. 74a, 75a (*Id.* ¶ 59). "Sam" refused to say whether he had been sent by the German

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[4] More than two years after Mr. El-Masri's release, he was contacted by one of his fellow inmates. Laid Saidi, an Algerian citizen who was detained in the same Afghan prison as Mr. El-Masri, memorized Mr. El-Masri's telephone number and sent him a text message upon his own release. *See* Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1, *available at* 2006 WLNR 11719762. The two have since spoken by telephone, and Mr. El-Masri has recognized Mr. Saidi's voice as that of his fellow detainee. *Id.*

[5] Subsequent media reports confirm that senior officials in Washington, including Defendant George Tenet, were informed long before Mr. El-Masri's release that the United States had detained an innocent man. App. 73a (*Id.* ¶ 53).

[6] At around this time, Mr. El-Masri felt what he believed to be a minor earthquake. App. 74a (*Id.* ¶ 56). Geological records confirm that in February and April, there were two minor earthquakes in the vicinity of Kabul. *Id.*

government or whether the government knew about Mr. El-Masri's whereabouts. *Id.*[7]

On May 28, Mr. El-Masri, accompanied by "Sam," was flown from Kabul to a country in Europe that was not Germany. App. 77a, 78a (*Id.* ¶¶ 66-71). There he was placed, blindfolded, into a truck and driven for several hours through mountainous terrain. App. 78a (*Id.* ¶¶ 72-74). He was given his belongings and told to walk down a path without turning back. App. 78a (*Id.* ¶ 74). Soon thereafter, he was confronted by armed men who told him he was in Albania and transported him to Mother Theresa Airport in Tirana. App. 79a, 80a (*Id.* ¶¶ 76-80). He was then escorted through customs and immigration and placed on a flight to Frankfurt. App. 79a, 80a (*Id.* ¶ 80).

### B. Criminal, Parliamentary, and Inter-Governmental Investigations

Upon his return to Germany, Mr. El-Masri contacted an attorney and related his story. App. 80a, 81a (*Id.* ¶ 84). The attorney promptly reported Mr. El-Masri's allegations to the German government, thereby initiating a formal investigation by public prosecutors. App. 84a, 85a (Gnjidic Decl. ¶¶ 5-7). Pursuant to their investigation, German prosecutors obtained and tested a sample of Mr. El-Masri's hair, which proved consistent with his account of detention in a South-Asian country and deprivation of food for an extended period. App. 86a (*Id.* ¶ 13). In January of 2007, German prosecutors issued arrest warrants for thirteen suspected CIA agents for their roles in the abduction and abuse of Mr. El-Masri. *See* Craig

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[7] Subsequent to his release, Mr. El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer. App. 75a, 76a (*Id.* ¶ 61).

Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/31/AR2007013100356.html.

A German parliamentary investigation of Mr. El-Masri's allegations is ongoing. App. 86a, 87a (*Id.* ¶¶ 15-16). Moreover, a separate European inquiry has now concluded, on the basis of Mr. El-Masri's testimony and substantial corroborating evidence, that Mr. El-Masri was abducted, detained, interrogated, and abused by the United States Central Intelligence Agency and its agents. *See* Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 3.1 (draft report 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf.

### C. U.S. Acknowledgments and Worldwide Media Coverage

The vast and growing body of public knowledge concerning the issues at the heart of this case comprises both official acknowledgements and descriptions of the rendition program in general, as well as detailed information and substantial corroborating evidence regarding Mr. El-Masri's case in particular. Mr. El-Masri's ordeal has received prominent coverage throughout the world and has been reported on the front pages of the United States' leading newspapers and on its leading news programs. In addition to widely disseminating Mr. El-Masri's allegations of kidnapping, detention, and abuse, these news reports have revealed a vast amount of information about the CIA's behind-the-scenes machinations during Mr. El-Masri's ordeal, and even

about the actual aircraft employed to transport Mr. El-Masri to detention in Afghanistan. *See, e.g.*, Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at A1, App. 105a (Watt Decl. ¶ 26ii) (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and involvement of CIA); *CIA Flying Suspects to Torture?* (60 Minutes, CBS television broadcast Mar. 6, 2005), App. 106a (Watt Decl. ¶ 26vi) (discussing rendition program and Mr. El-Masri's case, and describing U.S. modus operandi for renditions, in which "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away"); Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1, App. 107a (Watt Decl. ¶ 26viii) (describing in detail decision-making process during Mr. El-Masri's rendition, including internal CIA discussions and role of German and Macedonian governments); Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1, *available at* 2006 WLNR 11719762 (describing ordeal of Mr. El-Masri's fellow detainee in Afghan prison and their reconnection following release); Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, App. 105a, 106a (Watt Decl. ¶ 26iv) (describing Mr. El-Masri's rendition and CIA's broader rendition program).

Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters. For example, on December 5, 2005 – in highly publicized comments delivered the day before this litigation commenced – Secretary

of State Condoleezza Rice heralded the rendition program as "a vital tool in combating transnational terrorism," to be employed when, "for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option." Condoleezza Rice, *Remarks Upon Her Departure for Europe*, Dec. 5, 2005, App. 89a, 90a (Watt Decl. ¶ 4). In those instances, the Secretary explained, "the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." *Id.*

The government has also acknowledged that the CIA is the lead agency in conducting renditions for the United States. In public testimony before the 9/11 Commission of Inquiry, Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research, described the CIA's role in liaising with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process. *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm. App. 92a (Watt Decl. ¶ 9). Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA

involvement in renditions. *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at* http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf. App. 92a, 93a (Watt Decl. ¶ 10). More recently, President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.

**D. Proceedings Below**

On December 6, 2005, Mr. El-Masri filed this action against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States. Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed. App. 54a, 55a (Goss Decl. ¶ 7).

The district court held oral argument on the United States' motion on May 12, 2006. In an order dated that same day, the United States' motion to dismiss was granted. Mr. El-Masri thereafter appealed to the Court of the Appeals for the Fourth Circuit. The court of appeals held oral argument on November 28, 2006, with Mr. El-Masri, who had been granted a visa, in attendance. On March 2, 2007, the court of appeals upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.

Two months later, Defendant George Tenet, appearing on CNN to promote his memoir, disputed the truth of Mr. El-Masri's allegations despite the CIA's insistence in court papers that Mr. El-Masri's complaint must be dismissed because his allegations could neither be confirmed nor denied.[8]

## REASONS FOR GRANTING THE PETITION

### I. The Government's Increased Reliance on the Evidentiary State Secrets Privilege to Preclude Any Judicial Inquiry Into Serious Allegations of Grave Executive Misconduct Presents an Issue of Overriding National Significance.

It has been more than half a century since this Court's formal recognition of the common-law state secrets privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the family members of three civilians who died in the crash of a military

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[8] *The Situation Room* (CNN television broadcast May 2, 2007), transcript *available at* http://edition.cnn.com/TRANSCRIPTS/0705/02/sitroom.02.htm.

plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the Court required "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8. The greater the necessity for the allegedly privileged information in presenting the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. The *Reynolds* Court cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

Although the Court had not previously articulated the rules governing invocation of the privilege, it emphasized that the privilege was "well established in the law of evidence," 345 U.S. at 6-7, and cited treatises, including John Henry Wigmore's EVIDENCE IN TRIALS AT COMMON LAW, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of State, i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations." 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2212a (3d ed. 1940) (emphasis in original). Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." *Id.* Such limits included, at a minimum, requiring the trial judge to

scrutinize closely the evidence over which the government claimed the privilege:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.

*Id.* at § 2379.

This Court has not directly addressed the scope and application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. Indeed, *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[9] in

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[9] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver & Robert M. Pallitto, *State-secrets and Executive Power*, 120 POL. SCI. Q. 85, 100 (2005) (concluding that the executive is asserting the privilege

cases of greater national significance;[10] and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers." Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It has sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, to foreclose review of the NSA's warrantless datamining of calls and emails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities. *See Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or.

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with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"); *see also* Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, Jun. 4, 2006 ("Facing a wave of litigation challenging its eavesdropping at home and its handling of terror suspects abroad, the Bush administration is increasingly turning to a legal tactic that swiftly torpedoes most lawsuits: the state secrets privilege.").

[10] Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12, *available at* 2007 WLNR 4552726 ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").

2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006). It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau. *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190). And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens. *See El-Masri, supra; Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

In each of these instances, the government has sought dismissal at the pleading stage. Moreover, the privilege as asserted by the government and as construed by the court of appeals below has permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence. Accordingly, a broad range of executive misconduct has been shielded from judicial review after the *perpetrators themselves* have invoked the privilege to avoid adjudication. If employed as it was here, the privilege permits the Executive to declare a case nonjusticiable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing.

These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant Supreme Court review.

## II. The Court Should Grant Review to Clarify the Proper Scope and Application of the State Secrets Privilege.

### A. There is conflict and confusion in the lower courts as to the application and scope of the privilege.

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from this Court since its 1953 decision in *Reynolds,* have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege.

Two terms ago, in *Tenet v. Doe*, 544 U.S. 1 (2005), the Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[11] As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet,* 544 U.S. at 6. By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability. *Id.* at 9, 10. Nevertheless, some courts – including the court of appeals below – have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

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[11] In *Totten v. United States,* 92 U.S. 105 (1875), the Court dismissed at the pleading stage an action to enforce an alleged secret espionage contract, because the government could neither confirm nor deny the contract's existence.

Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This Court should accept review in the present case to resolve conflicting decisions and widespread confusion in the lower courts about several aspects of the privilege: how and when the government properly may invoke the evidentiary state secrets privilege; when a case may be dismissed on the basis of the privilege; and how deeply and in what manner a court must scrutinize the government's claim of privilege.

1. **There is confusion as to when the government may invoke the privilege and what the privilege may be invoked to protect.**

There is substantial confusion in the lower courts regarding two closely-related matters: *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue. *Reynolds*, 345 U.S. at 3. Consistent with *Reynolds*, some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence. *See, e.g., In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, pre-discovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); *Hepting*, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion

of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); *Nat'l Lawyers Guild v. Att'y General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).

Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose. *See, e.g., Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); *Sterling v. Tenet*, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); *Black v. United States*, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); *Terkel*, 441 F. Supp. 2d at 918. In recent years, the government has increasingly invoked the privilege in such a manner, seeking and at times obtaining dismissal of suits pursuant to the privilege prior to any discovery. *See* Point I, *supra*.

**2. <u>There is confusion as to when a lawsuit may be dismissed on the basis of the privilege.</u>**

Perhaps the greatest source of confusion in the lower courts with respect to the privilege is whether a case may ever properly be dismissed at the pleading stage on the basis of the state secrets privilege – a stage in which the invocation must be asserted over abstract or predictive categories of information, and must be assessed in a vacuum without actual contested evidence. Decisions permitting pleading-

stage dismissal of entire actions or claims on state secrets grounds often stem from an erroneous conflation of the *Totten/Tenet* doctrine and the evidentiary state secrets privilege. *See supra* at n.11 and accompanying text.

A number of courts have held that a case may be dismissed at the pleading stage pursuant to the state secrets privilege if the "very subject matter" of the suit is a state secret. *See, e.g., Zuckerbraun,* 935 F.2d at 547 (dismissing wrongful death claim implicating ship's weapons system at pleading stage because very subject matter was state secret); *Sterling,* 416 F.3d at 348; *see also Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998). Still other courts have dismissed suits at the pleading stage not because the "very subject matter" was a state secret, but because the court accepted the government's wholly predictive judgment that state secrets would be so central to proving the parties' claims or defenses that the litigation could not conceivably reach resolution. *See, e.g., Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (dismissing contract suit between defense contractors at pleading stage because any trial would "inevitably" reveal state secrets); *Bareford v. General Dynamics Corp.,* 973 F.2d 1138 (5th Cir. 1992) (dismissing case because trial "would inevitably lead to a significant risk" that state secrets would be disclosed); *Black,* 62 F.3d at 1119; *Terkel,* 441 F. Supp. 2d at 918.

Other courts, however, have properly refused to dismiss suits at the pleading stage, rejecting the government's invitation to assess the effect of a privilege claim in the absence of actual evidence, and recognizing the impossibility of determining at the pleading stage what evidence would be relevant and

necessary to the parties' claims and defenses. *See, e.g., In re United States*, 872 F.2d at 477 (refusing to dismiss Federal Tort Claims action merely on basis of the government's "unilateral assertion that privileged information lies at the core of th[e] case"); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds as premature); *Hepting*, 439 F. Supp. 2d at 994 (refusing to evaluate whether parties could prove claims and defenses without state secrets – and to dismiss on that basis – at pleading stage); *Al-Haramain*, 451 F. Supp. 2d at 1226-27, 1229, 1231-32 (refusing to dismiss challenge to NSA's warrantless surveillance of plaintiffs on basis of privilege and permitting case to proceed to discovery).

There is considerable confusion in the lower courts about other conditions that must be satisfied before a case may be dismissed on the basis of the state secrets privilege, regardless of whether dismissal is being considered at the outset of the case or at later stages. For instance, some courts permit all possible non-sensitive discovery to proceed before considering dismissal pursuant to the privilege. *Halkin v. Helms ("Halkin II")*, 690 F.2d 977, 984 (D.C. Cir. 1982) (noting parties fought "the bulk of their dispute on the battlefield of discovery," before dismissing case);

*Monarch Assurance P.L.C.*, 244 F.3d at 1364 (upholding privilege but remanding because discovery had been unduly limited); *Hepting*, 439 F. Supp. 2d at 994 (refusing to dismiss challenge to phone company's involvement in NSA warrantless wiretapping because plaintiffs were "entitled to at least some discovery," after which privilege could be assessed "in light of the facts"); *Al-Harmain*, 451 F. Supp. 2d at 1229, 1231-32 (permitting discovery to proceed). Other courts, like the court of appeals below, permit dismissal without requiring even non-sensitive discovery. *See, e.g., Zuckerbraun*, 935 F.2d at 548; *Farnsworth,* 635 F.2d at 281; *Black,* 62 F.3d at 1119.

Similarly, some courts permit or require a full presentation of all non-privileged evidence to support the parties' claims and defenses before determining whether a case must be dismissed on the basis of the privilege. *See, e.g., Bareford,* 973 F.2d at 1140 (dismissing suit on basis of privilege but first permitting plaintiff to submit all non-privileged evidence); *Ellsberg v. Mitchell*, 709 F.2d 51, 64 n.55 (D.C. Cir. 1983) (reversing dismissal of constitutional tort action and remanding where district court "did not even consider whether the plaintiffs were capable of making out a *prima facie* case without the privileged information"); *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260, 1268 (Fed. Cir. 2005); *ACLU v. NSA,* 438 F. Supp. 2d at 765 (refusing to dismiss challenge to NSA warrantless surveillance because parties' claims and defenses could be evaluated based on non-privileged evidence); *Al-Haramain*, 451 F. Supp. 2d at 1226 (refusing to dismiss at pleading stage challenge to NSA's warrantless surveillance of plaintiffs where court was simply "not yet convinced that [allegedly privileged] information [was] relevant to the case and

[would] need to be revealed"); *Hepting*, 439 F. Supp. 2d at 994 (refusing to dismiss challenge to phone company's involvement in NSA warrantless surveillance where it was "premature" to decide which facts were relevant and necessary to claims and defenses "at the present time"). Other courts, however, dismiss cases without regard to the non-privileged evidence at the parties' disposal. *See, e.g., Fitzgerald v. Penthouse Internat'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) (dismissing suit despite plaintiff's ability to rely on non-privileged evidence); *Black*, 62 F.3d at 1119 (dismissing suit because "the litigation [could] not be tailored to accommodate the loss of the privileged information" without assessing any non-privileged evidence); *Kasza*, 133 F.3d at 1170 (dismissing suit concerning hazardous materials at Air Force facility without analyzing non-privileged evidence).

Finally, the lower courts have no uniform practice concerning whether and when a court must consider alternatives to dismissing a case on the basis of the privilege and what those alternatives might be. Some courts have improperly dismissed cases on the basis of the privilege without explicitly considering *any* alternatives. *See, e.g., Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (dismissing religious discrimination suit without consideration of alternatives); *Farnsworth Cannon*, 635 F.2d at 281. Other courts have explicitly considered and rejected alternatives before dismissing a suit on the basis of the privilege. *See, e.g., Fitzgerald*, 776 F.2d at 1244 (dismissing suit but holding that "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted"). Still other courts have expressly refused to dismiss where certain procedural safeguards might enable the case to

proceed. *See, e.g., Halpern v. United States,* 258 F.2d 36, 41 (2d Cir. 1958) (refusing to dismiss Invention Secrecy Act suit because case could be tried in camera); *In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as case proceeds); *Hepting,* 439 F. Supp. 2d at 1010-1011 (proposing appointment of special master to handle privilege questions during discovery).

3. **There is confusion as to how deeply and in what manner a court must scrutinize the government's privilege claim.**

There is a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Notwithstanding *Reynolds'* clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government's state secrets claim must be afforded the most extreme form of deference. *See, e.g., Zuckerbraun*, 935 F.2d at 547; *Sterling,* 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); *Kasza,* 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference"). Other courts properly have scrutinized the government's privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed. *See, e.g., In re United States*, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its

important judicial role."); *Ellsberg*, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); *Hepting*, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); *Al-Haramain*, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

This confusion as to the proper judicial role plays out with particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal. *See, e.g., Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980). Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government. *See, e.g., Sterling*, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of

allegedly privileged evidence not required); *Black*, 62 F.3d at 1119 (examining only government declarations); *Kasza*, 133 F.3d at 1170 (same).

To be sure, when, as here, the government invokes the privilege before any evidence has even been requested, a court cannot possibly conduct the analysis required by *Reynolds*. Accordingly, this Court should reaffirm that the privilege must be invoked with respect to specific evidence on an item-by-item basis, rather than overly broad categories of information whose relevance has not been determined. It should clarify that dismissal of a suit on the basis of the state secrets privilege is appropriate *solely* when the removal of privileged evidence renders it impossible for the plaintiff to put forth a prima facie case, or for the defendant to assert a valid defense – a determination that cannot be made at the pleading stage. And it should permit the plaintiff to submit all non-privileged evidence before the court evaluates the consequences of the government's invocation of the privilege.

### B. Mr. El-Masri's case is illustrative of the lower courts' departure from the privilege's evidentiary roots and from the principles of *Reynolds*.

Mr. El-Masri's case provides a compelling example of the lower courts' acquiescence in the government's expansion of the privilege beyond its evidentiary foundation. In this case, the government sought outright dismissal of Mr. El-Masri's claims by invoking an evidentiary privilege before any evidence had even been requested. Indeed, the government's arguments were not evidentiary: the government did not, because it could not, invoke the privilege with respect to specific evidence. Relying entirely on the CIA Director's speculative assessment of what

evidence *might* be required to adjudicate Mr. El-Masri's claims, and the sweeping contention that any confirmation or denial of any allegation related to Mr. El-Masri's case would cause harm to the nation, the lower courts acceded to the government's demand that Mr. El-Masri be denied any judicial remedy for his unconscionable and unlawful treatment by U.S. officials.

As some courts have recognized, attempting to discern the "impact of the government's assertion of the state secrets privilege" before the plaintiff's claims have developed and the relevancy of privileged material has been determined is "akin to putting the cart before the horse." *Crater Corp.*, 423 F.3d at 1268. Nothing in *Reynolds* remotely sanctions such a practice. And the lower courts' threshold error in this case – permitting invocation of an evidentiary privilege without any evidence to consider – set the stage for their more consequential error of depriving Mr. El-Masri of a forum without adequately exploring whether his case could be litigated without privileged evidence. The courts granted and upheld dismissal of Mr. El-Masri's suit without permitting non-sensitive discovery, without considering abundantly available non-privileged evidence corroborating Mr. El-Masri's allegations, and without considering alternative procedures that might permit litigation of the case without public disclosure of privileged evidence.

Had the lower courts required the government to invoke the privilege solely with respect to specific evidence, it would have been evident that Mr. El-Masri's case does not depend on disclosure of state secrets. The central facts of this case are not state secrets and do not become so simply because the government insists otherwise. Far too many facts

about this case, and about the CIA's rendition program in general, have been officially acknowledged or made public for the government plausibly to contend that it "can neither confirm nor deny [Mr. El-Masri's] allegations" without "damage to the national security and our nation's conduct of foreign affairs . . . ." App. 55a (Goss Decl. ¶ 7). As a matter of law and common sense, the government cannot legitimately keep secret what is already widely known. *See, e.g.*, *Ellsberg*, 709 F.2d at 61 (rejecting portion of privilege claim on ground that so much relevant information was already public); *see also Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (noting that Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (suggesting that government would have no interest in censoring information already "in the public domain").

The CIA's extraordinary rendition program is not a state secret. President Bush's public confirmation that the CIA has operated detention and interrogation centers overseas plainly demonstrates that the "very subject matter" of this litigation – the abduction, detention, and coercive interrogation of Khaled El-Masri by the CIA – is not a state secret. Indeed, the government has repeatedly defended the existence of the rendition program and described its parameters, while denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss this action has the government insisted that it can neither admit the former nor deny the latter.

Similarly, Mr. El-Masri's allegations, reported in hundreds of press accounts and supported by abundant corroborating evidence – including

eyewitnesses and scientific testing – are not state secrets. The government wholly failed to demonstrate how formal confirmation of what the entire world already knows would reasonably cause harm to American security. The idea that foreign intelligence services and terrorist enemies are awaiting confirmation in a judicial proceeding – and have entirely disregarded the government-sourced news media accounts and public reports that describe in detail the means and methods of the rendition program – is inherently implausibe, and cannot provide a basis for denying Mr. El-Masri a remedy. *See Hepting,* No. C-06-672, slip. op. at 31 (noting that specific involvement of AT&T in program acknowledged by government "is hardly the kind of 'secret' that . . . a potential terrorist would fail to anticipate").

## III. If The Court Believes that *Reynolds* Requires Dismissal of Mr. El-Masri's Claims, then This Case Presents an Appropriate Vehicle for Partial Reexamination of *Reynolds.*

This Court has not revisited its holding in *Reynolds* in more than half a century. *Reynolds* was a wrongful death suit in which the privilege was invoked during discovery to block disclosure of a single document. The Executive Branch's assertion of the state secrets privilege in such a case is quite unlike a sweeping assertion of the privilege to foreclose judicial review of entire categories of executive misconduct. Experience has shown that a set of rules devised to govern the former situation may be inadequate as a check on the latter. In *Reynolds*, the Executive was not suspected of employing the privilege to avoid liability or accountability, and the privilege was upheld after the

government had provided an alternative means for the plaintiffs to prove their case. This Court concluded that a plaintiff's ability to obtain evidence in a personal injury suit must be subordinated to the government's legitimate security concerns. It is far from clear that the Court would have balanced the equities in the same manner had the Executive been attempting to foreclose any judicial review in a case alleging grave misconduct by the Executive branch.

Since this Court's decision in *Reynolds,* two developments have called into question aspects of its holding. First, the privilege is now routinely invoked to block adjudication of disputes that raise profound constitutional questions about the enumerated powers of the three branches and, more specifically, the role of courts in safeguarding individual rights against serious abuses of government power. (*See* Point I, *supra.*) Second, courts have become more accustomed to assessing claims regarding access to sensitive information than they were in 1953. Under the Freedom of Information Act, for instance, Congress authorized courts to determine whether the government has properly classified information. *See* 5 U.S.C. § 552(a)(4)(B) & (b)(1) (2002); *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (describing *de novo* review procedures required by FOIA). Similarly, under the Foreign Intelligence Surveillance Act, Article III judges must independently review the government's assertion that electronic surveillance is needed for foreign intelligence purposes. *See* 50 U.S.C. § 1805 (2006). FISA empowers all federal district courts, not just the special FISA court, to review highly sensitive information in camera and ex parte to determine whether the surveillance was authorized and conducted in accordance with FISA. *See* 50 U.S.C. § 1806(f) (2006).

Finally, the Classified Information Procedures Act, 18 U.S.C. App. 3, empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used at trial. *See generally United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Section 4 of CIPA, which allows for defense discovery of classified information, explicitly provides courts with discretion to deny government requests to delete specific data from classified materials or substitute summaries or stipulations of facts. 18 U.S.C. App. 3 § 4. When section 4 of CIPA is invoked, a judge must determine the relevance of the information in light of the asserted need for information and any claimed government privilege.

These developments call for the reexamination of *Reynolds*. At a minimum, the Court should require in all instances that the government produce the evidence as to which it has invoked the privilege for in camera inspection by the district court. Courts are plainly equipped to evaluate such evidence, and requiring in camera inspection would avoid the doctrinal confusion attendant to adjudicating the effects of an evidentiary privilege in the absence of actual evidence. And, in cases in which the government is a party and plaintiffs raise serious allegations of grave executive misconduct – such as the kidnapping and torture claims at the heart of this suit – the evidentiary consequences of the government's invocation of the state secrets privilege should not be borne by the plaintiff alone. In such cases, even if the privilege is validly invoked to prevent disclosure of sensitive evidence, compensatory action – such as construing facts in favor of deprived litigants or shifting burdens against the government – may be the only means for the courts to enforce constraints on executive power.

This Court allocated the evidentiary burdens in *Reynolds*, and it has both the authority and the obligation to amend those burdens if they interfere with the judiciary's constitutional role in reviewing the legality of executive actions. Otherwise, the government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.

## CONCLUSION

For the reasons stated above, petitioner urges this Court to grant review in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| Khaled El-Masri, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:05cv1417-TSE-TRJ |
| | ) | |
| George Tenet, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER**

Plaintiff in this civil suit claims to be an innocent victim of the United States' "extraordinary rendition" program[1] and seeks redress from the former Director of the Central Intelligence Agency (CIA), private corporations allegedly involved in the program, and unknown employees of both the CIA and the private corporations. At issue is whether the assertion of the state secrets privilege by the United States is valid, and, if so, whether this privilege prevents this case from proceeding.

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[1] The complaint alleges that since the early 1990s the CIA has been operating interrogation centers in countries where the United States believes legal safeguards do not constrain efforts to interrogate suspected terrorists. This practice is commonly known as "extraordinary rendition."

## I.

### A. Facts[2]

Plaintiff Khaled El-Masri is a German citizen of Lebanese descent. His allegations begin on New Years Eve 2003 when he claims he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonia. Following his abduction, El-Masri alleges the Macedonian authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. After thirteen days of this treatment, El-Masri alleges he commenced a hunger strike to protest his detention, and he did not eat again in Macedonia.

On January 23, 2004, El-Masri claims several men in civilian clothes entered his hotel prison room. They forced El-Masri to make a statement that he had not been mistreated by his captors, and would shortly be flown back to Germany. After his captors videotaped this statement, El-Masri states he was blindfolded and driven to what sounded like an airstrip approximately one hour from Skopje. Still blindfolded, he alleges he was led to a building where he was beaten, stripped of his clothing, and

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[2] As appropriate when considering a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., the facts recited here are derived from the complaint and assumed true. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994) (plaintiff's version of facts accepted as true at threshold dismissal stage).

sodomized with a foreign object. He further alleges he was dragged naked to a corner of the room where his captors removed his blindfold only for him to be blinded again by a camera's flash. When he regained his sight, he claims he saw seven or eight men dressed in black and wearing black ski masks. El-Masri contends that these men were members of a CIA "black renditions" team, operating pursuant to unlawful CIA policies at the direction of defendant Tenet. These men, he alleges, dressed him in a diaper, a tracksuit and earmuffs. He claims he was then blindfolded, shackled and dragged to an airplane where his captors injected him with a sedative that rendered him nearly unconscious. In this drugged state, he states he was secured inside the aircraft and thereafter only dimly remembers the airplane landing once and taking off again before finally depositing him in a place that El-Masri knew from the air temperature was not Germany. Indeed, El-Masri was to discover later that he had been flown to Kabul, Afghanistan.[3]

Upon reaching Kabul, El-Masri claims he was again beaten and then placed in a small, cold cell. He contends this prison was a CIA-run facility known as the "Salt Pit," an abandoned brick factory north of the Kabul business district. El-Masri alleges he was

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[3] In his complaint, El-Masri alleges that documentary evidence supports his recollection. He claims aviation documents show that late on the evening of January 23, 2004 a Boeing business jet owned by defendant Premier Executive Transport Services, Inc. (PETS) and operated by defendant Aero Contractors Limited (ACL) flew from Skopje, Macedonia to Kabul, Afghanistan with a brief stop in Baghdad, Iraq. This documentary evidence is attached to the plaintiff's memorandum of points and authorities in opposition to the United States' motion to dismiss.

detained in the "Salt Pit" for the next four months, during which time he was repeatedly interrogated about his alleged association with terrorists, including September 11 conspirators Mohammed Atta and Ramzi Binalshibh. He points out that although the prison facility was nominally run by Afghans, two of his interrogators identified themselves as Americans. He claims he repeatedly beseeched his captors to contact the German government on his behalf, but these requests were denied.

In March, El-Masri contends he and several other inmates commenced another hunger strike to protest their continued confinement. After 27 days without food, El-Masri states he was brought before two unmasked persons he believes were CIA agents in charge of the "Salt Pit." These men refused to accede to El-Masri's demands to release him, to charge him with a crime, or to allow him to contact a German official. Although the American official denied these requests, El-Masri contends the official conceded to El-Masri that El-Masri's detention was a mistake, but that he could not agree to El-Masri's release without permission from Washington. At this point, El-Masri states he was returned to his cell where he continued his hunger strike. After ten more days without nourishment, El-Masri asserts his captors fed him forcibly by inserting tubes into his nose and his mouth through which they pumped liquid sustenance. Soon thereafter, El-Masri states he was given canned food and books to read. El-Masri alleges that his hunger strike had a deleterious effect on his health; he lost sixty pounds over the course of his detention.

El-Masri contends that the CIA had determined soon after his arrival in Afghanistan that

they were detaining an innocent man. Further, he contends that Tenet knew this fact by April 2004 and that Secretary of State Condoleeza Rice knew by early May that El-Masri was the victim of mistaken identity.[4] Nonetheless, El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon. El-Masri asserts that he remains deeply traumatized by his abduction and treatment during his detention.

**B. Proceedings**

The complaint in this case was filed on December 6, 2005, naming the following defendants: (1) former Director of the CIA George Tenet, (2) certain unknown agents of the CIA (John Does 1-10) (3) PETS, (4) ACL, (5) Keeler and Tate Management (KTM),[5] (6) and certain unknown employees of the

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[4] El-Masri also intimates that the German government was aware of his captivity. In addition to his American interrogators, El-Masri describes meeting a German speaker who identified himself only as "Sam." "Sam" asked El-Masri many of the same questions as his American interrogators, but ultimately informed him that he would be released only if he agreed never to discuss what had happened over the last five months.

[5] According to El-Masri, the aircraft used in his transfer from Macedonia to Afghanistan was sold by PETS to KTM on or about November 14, 2004, shortly after reports of the aircraft's involvement in the "extraordinary rendition" program. El-Masri contends that this transfer was fraudulent because it was done to

defendant corporations (John Does 11-20). Tenet is sued in his individual capacity for authorizing the unknown CIA agents' actions with actual or constructive knowledge that such actions were illegal, and John Does 1-10 are sued for their actual participation in El-Masri's treatment. El-Masri sues the American corporations PETS, ACL and KTM, as well as their employees, for their participation in the CIA's "extraordinary rendition" that victimized El-Masri. El-Masri contends that these corporate defendants are liable for authorizing the use of aircraft they owned or operated for the transfer of suspected terrorists to detention facilities despite the corporate defendants' knowledge that the suspected terrorists, including El-Masri, would be detained incommunicado, tortured and subjected to other cruel treatment.

El-Masri asserts three separate causes of action. The first claim is brought against Tenet and the unknown CIA agents pursuant to the cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of El-Masri's Fifth Amendment right to due process. Specifically, El-Masri contends that Tenet and John Does 1-10 violated the Due Process Clause's prohibition against anyone acting under color of U.S. law (1) to subject any person held in U.S. custody to treatment that "shocks the conscience," or (2) to deprive any person of liberty in the absence of legal process. El-Masri's second cause of action is brought

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avoid potential liability for PETS' acts. El-Masri contends that KTM is the successor to PETS, carrying on the same business and operations and utilizing the same personnel and assets as PETS.

against all defendants pursuant to the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged arbitrary detention.[6] Likewise, El-Masri's final cause of action is brought pursuant to the ATS for each defendant's violation of international legal norms prohibiting cruel, inhuman, or degrading treatment.

On March 8, 2006, the United States filed a statement of interest and a formal claim of the state secrets privilege. In support of its formal claim of privilege the United States submitted both an unclassified and a classified *ex parte* declaration of the Director of the CIA (DCI). Thereafter, on March 13, 2006, the United States moved to intervene in the suit pursuant to Rule 24(a), Fed.R.Civ.P. in order to protect its interests in preserving its state secrets. The motion was granted on March 21, 2006. *El-Masri v. Tenet*, Case No. 1:05cv1417 (E.D. Va. March 21, 2006). Concurrent with the motion to intervene, the United States moved for dismissal or for summary judgment on the ground that maintenance of the suit would invariably lead to disclosure of its state secrets. The parties presented oral argument on this motion on May 12, 2006.

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[6] Codified at 28 U.S.C. § 1350, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004), has interpreted this statute as providing district courts jurisdiction over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law. *Id.* at 724. The Supreme Court did not identify precisely which well-recognized norms of international law are actionable under the ATS.

## II.

The United States' dismissal motion and the plaintiff's opposition raise important threshold issues, the resolution of which requires a two step analysis. First, it is necessary to determine whether the United States' assertion of the state secrets privilege is valid in this case. If not, the inquiry is over and the United States' dismissal motion must be denied. On the other hand, if the assertion of the privilege is valid, then the second step in the analysis requires determining whether dismissal is required or whether the case may nonetheless proceed in some fashion that adequately safeguards any state secrets.

### A.

Determining whether the state secrets privilege has been validly asserted requires an understanding of the nature and purpose of the privilege and of who may assert it. The state secrets privilege is an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch. *See United States v. Reynolds*, 345 U.S. 1 (1953). As such, it must be formally asserted by the head of the Executive Branch agency with control over the state secrets at issue, and then only after that person has personally considered the matter. *See id.* If validly asserted the state secrets privilege permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983). More particularly, "the various harms, against which protection is sought by invocation of the privilege, include impairment of the

nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *In re Under Seal,* 945 F.2d 1285, 1287 n. 2 (4th Cir. 1991) (quoting *Ellsberg v. Mitchell,* 709 F.2d 51, 57 (D.C. Cir. 1983)); *see also Sterling v. Tenet,* 416 F.3d 338, 346 (4th Cir. 2005). Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as "evidentiary" in nature, it is in fact a privilege of the highest dignity and significance.

As noted, the privilege belongs solely to the Executive Branch and must be formally asserted by the head of the Executive Branch agency with responsibility for, and control over, the state secrets involved. Once it is determined that the appropriate officer has invoked the privilege, the next step in the judicial inquiry into the validity of the assertion is to determine whether the information for which the privilege is claimed qualifies as a state secret. Importantly, courts must not blindly accept the Executive Branch's assertion to this effect, but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. *Reynolds,* 345 U.S. at 10. This determination requires a court to consider whether "a responsive answer . . . or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Sterling,* 416 F.3d at 343 (quoting *Reynolds,* 345 U.S. at 9). In other words, this part of the inquiry focuses on whether the United States has made an adequate showing that disclosure of claimed privileged material would injure national security.

How searching the judicial inquiry must be depends on the particular circumstances of the case, for it is well-settled that the depth of a court's inquiry increases relative to the adverse party's need for the information the government seeks to protect. *Reynolds,* 345 U.S. at 11; *Sterling,* 416 F.3d at 343. If the information is peripheral to the adverse party's claims, the court's inquiry need not be as searching as it must be in cases where the claimed state secrets are at the core of the suit. In those cases where the claimed state secrets are at the core of the suit and the operation of the privilege may defeat valid claims, courts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield "material not strictly necessary to prevent injury to national security." *Ellsberg,* 709 F.2d at 58. But, in undertaking this inquiry, courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security.[7] Accordingly, the judiciary must accept the executive branch's assertion of the privilege whenever its independent inquiry discloses a *"reasonable danger* that compulsion of the evidence will expose

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[7] *See United States v. Nixon,* 418 U.S. 683, 710 (1974) (claims of privilege for military or diplomatic secrets "traditionally shown the utmost deference."); *see also C. & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10 (emphasis added). Importantly, once the court is satisfied that any disclosure of the putative secrets "*might have a deleterious effect on national security*, 'the claim of the privilege will be accepted without requiring further disclosure.'" *Id.* (quoting *Reynolds*, 345 U.S. at 9).

Finally, it is important to note that, unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake.[8] Thus, the adverse party's need for privileged information affects only the depth of the judicial inquiry into the validity of the assertion and not the strength of the privilege itself, for "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11.

Given these governing principles, there is no doubt that the state secrets privilege is validly asserted here. To begin with, the privilege has been formally asserted by the appropriate Executive Branch official, the DCI, who has done so by submitting an *ex parte* classified declaration labeled "JUDGE'S EYES ONLY," and also an unclassified

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[8] *See In re Under Seal*, 945 F.2d 1285, 1288 (4th Cir. 1991) ("the privilege is absolute when properly invoked"); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) ("[S]ecrets of state-matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation-are absolutely privileged from disclosure in the courts.").

declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege. It is, of course, inappropriate to reveal here the substance of the DCI's classified *ex parte* declaration, for to do so would compromise "the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. It is enough to note here that the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security. This conclusion finds firm support in the details disclosed in the DCI's classified *ex* parte declaration.

Plaintiff's argument that government officials' public affirmation of the existence of a rendition program[9] undercuts the claim of privilege misses the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons,

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[9] *See* Declaration of Stephen Macpherson Watt in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Watt Decl.") Exh. A.

companies or governments involved.[10] Nor is the government's assertion of the privilege here intended to protect from disclosure this general information. Instead, the government seeks to protect from disclosure the operational details of the extraordinary rendition program, and these details are validly claimed as state secrets. Accordingly, El-Masri's argument that generalized public admissions somehow undercut the government's right to protect the specific details of the "extraordinary rendition" program are unavailing.

Nor is the strength of the government's privilege somehow diminished by either El-Masri's complaint or the numerous media, government or other reports discussing renditions, often relying largely on El-Masri's allegations.[11] It is self-evident that a private party's allegations purporting to reveal the conduct of the United States' intelligence services overseas are entirely different from the official admission or denial of those allegations. Furthermore, neither the United States' claim of privilege, nor a judicial acceptance of that claim is tantamount to an admission that El-Masri's factual allegations are true. The applicability of the state secrets privilege is wholly independent of the truth or falsity of the complaint's allegations. While a public

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[10] This distinction between the general and the particular is exemplified by Secretary of State Rice's public comments concerning El-Masri's claims in which she affirmed the existence of the program but declined to comment on the specific facts alleged by El-Masri. *See* Watt Decl. Exh. B. Although not revealing any details about the program, she did say in response to a question about El-Masri's allegations that "when and if mistakes are made, we work very hard to rectify them." *Id.*

[11] *See generally id.*

admission of the alleged facts would obviously reveal sensitive means and methods of the country's intelligence operations, a denial of the alleged facts would also be damaging, as it may raise an inference of veracity in those cases where the government does not deny similarly sensitive allegations but asserts the state secrets privilege instead. For this reason, the CIA has appropriately adopted the policy of neither admitting nor denying allegations regarding the means, methods, persons, entities or countries used in its foreign intelligence operations. In light of this sensible policy, and on the basis of the DCI's public and classified *ex parte* declarations, the Court finds the United States' privilege is validly asserted in this case.

**B.**

If a court finds that the state secrets privilege has been validly asserted, it must then determine whether the case must be dismissed to prevent public disclosure of those secrets, or whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets. Resolution of this issue will depend on the centrality of the privileged material to the claims or defenses asserted by either party. As the Fourth Circuit has recently put it, "when the very subject of the litigation is itself a state secret," and where there is "no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case." *Sterling*, 416 F.3d at 347-48 (quoting *Fitzgerald v. Penthouse Int'l., Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985)) (internal quotations omitted). Thus, while it is well-settled that "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard

privileged material," it is equally well-settled that "where the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy." *Id.* at 348 (internal quotations and citations omitted). In sum, the question is whether El-Masri's claims could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege.

In the instant case, this question is easily answered in the negative. To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program.[12] As noted above, any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument. *See* Rule 8(b), Fed.R.Civ.P. ("A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.").

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[12] For purposes of the present analysis it is appropriate to assume that El-Masri has stated a cognizable claim; the strength or weakness of his legal claims is immaterial to the resolution of the state secrets privilege dismissal motion. It is nonetheless worth noting that El-Masri's legal claims are novel and might well be vulnerable to dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P., quite apart from the application of the state secrets privilege. *See generally* Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib-Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U.L.Rev. 371 (2005).

These threshold answers alone would reveal considerable detail about the CIA's highly classified overseas programs and operations.

Finally, the fact that any answer to the complaint would potentially disclose information protected by the privilege refutes El-Masri's argument that special procedures short of dismissal would be adequate to protect the government's validly asserted privilege. To be sure, special procedures, such as clearing defense counsel for access to classified information and the application of the Classified Information Procedures Act (CIPA), 18 U.S.C.App. 3, could be, and indeed have been, used effectively in appropriate circumstances in other cases. These are not appropriate circumstances. Such procedures are plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets. As the Fourth Circuit recognized in *Sterling,* where "the whole object of the suit and of the discovery is to establish a fact that is a state secret" special procedures are inadequate. 416 F.3d at 348. Precisely this is the case here. Further, even assuming some mechanism might be used to avoid disclosure of state secrets in the answer, it is clear that the use of special procedures during discovery and trial would be wholly inadequate to preserve the United States' privilege. The Fourth Circuit also addressed this point in *Sterling* where it noted that:

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial-or even *in camera*-is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst,

> that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

*Sterling*, 416 F.3d 338. Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets. The United States' motion to dismiss must therefore be granted.

**C.**

The United States' dismissal motion also argues that the recently reaffirmed so-called *Totten* bar renders this case non-justiciable. *See Tenet v. Doe*, 544 U.S. 1 (2005). This argument is problematic in certain respects, but in the end need not be reached.

The *Totten* bar is quite distinct from the state secrets privilege; it is not a privilege or a rule of evidence; it is instead a rule of non-justiciability that deprives courts of their ability to hear "suits against the Government based on covert espionage agreements" even in the absence of a formal claim of privilege. *Id.* at 1233. It is properly invoked only in those cases "where success depends upon the existence of [a] secret espionage relationship with the government," or where the government cannot openly "admit or deny [a] fact that [is] central to the suit." *Id.* at 1236-37. In *Totten*, the Supreme Court forbade the suit of a self-proclaimed Civil War secret agent attempting to enforce the secret espionage agreement

he claimed he had negotiated with President Lincoln on the ground that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *See Totten v. United States*, 92 U.S. 105, 107 (1876). *See also Weinberger v. Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. 139, 146-47 (1981) (holding that whether the Navy had complied with the National Environmental Policy Act (NEPA) with respect to its storage of nuclear materials was "beyond judicial scrutiny"). In *Tenet*, the Supreme Court applied the *Totten* bar to a suit brought by former Soviet double agents seeking to enforce their agreement with the CIA, but made clear that the bar was not limited to contract actions, but applies whenever a party's "success depends upon the existence of [a] secret espionage relationship with the government." *Tenet*, 125 S. Ct. at 1236.

It is debatable whether the *Totten* bar would apply to the present case. It is true that El-Masri's allegations here concern the existence of several "secret espionage relationships" between the United States and both certain foreign governments and the corporate defendants, but it is also true that El-Masri himself was not a party to any of these secret espionage agreements or relationships. There is, therefore, some doubt whether *Totten* speaks to the circumstances at bar. In any event, because the valid assertion of the state secrets privilege presents an adequate and independent ground for dismissal of this case, it is unnecessary to reach and decide the applicability of the *Totten* bar to the facts of this case.

**D.**

It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.

Finally, it is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

Accordingly, and for the reasons stated from the bench,

It is hereby **ORDERED** that the United

States' claim of the state secrets privilege is **VALID.**

It is further **ORDERED** that given the application of the privilege to this case, the United States' motion to dismiss must be, and hereby is, **GRANTED.**

The Clerk is directed to send a copy of this Order to all counsel of record and to place this matter among the ended causes.

Alexandria, Virginia
May 12, 2006

s/ T.S. Ellis, III
U.S. District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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| KHALED EL-MASRI<br>Plaintiff-Appellant,<br><br>v.<br><br>GEORGE TENET, et al.<br>Defendants-Appellees,<br><br>UNITED STATES OF AMERICA<br>Intervenor-Appellee. | Case No.<br>06-1667 |

Appeal from the United States District Court
for the Eastern District of Virginia
T.S. Ellis, III, District Judge.
(1:05-cv-01417-TSE)

Argued: November 28, 2006

Decided: March 2, 2007

Before KING, SHEDD, and DUNCAN,
Circuit Judges

**OPINION**

KING, Circuit Judge:

Khaled El-Masri appeals from the dismissal of his civil action against former Director of Central Intelligence George Tenet, three corporate

defendants, ten unnamed employees of the Central Intelligence Agency (the "CIA"), and ten unnamed employees of the defendant corporations.[13] In his Complaint in the Eastern District of Virginia, El-Masri alleged that the defendants were involved in a CIA operation in which he was detained and interrogated in violation of his rights under the Constitution and international law. The United States intervened as a defendant in the district court, asserting that El-Masri's civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed. By its Order of May 12, 2006, the district court agreed with the position of the United States and dismissed El-Masri's Complaint. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006) (the "Order"). On appeal, El-Masri contends that the district court misapplied the state secrets doctrine and erred in dismissing his Complaint. As explained below, we affirm.

I.

A.

On December 6, 2005, El-Masri, a German citizen of Lebanese descent, filed his Complaint in this case, alleging, in substance, as follows: on

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[13] The corporate defendants named in El-Masri's Complaint are Premier Executive Transport Services, Inc., which the Complaint describes as doing business in Massachusetts; Keeler and Tate Management LLC, described as doing business in Nevada; and Aero Contractors Limited, described as doing business in North Carolina. *See* Complaint ¶¶ 9-11. The Complaint is found at J.A. 9-34. (Citations herein to "J.A. ----" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

December 31, 2003, while traveling in Macedonia, he was detained by Macedonian law enforcement officials; after twenty-three days in Macedonian custody, he was handed over to CIA operatives, who flew him to a CIA-operated detention facility near Kabul, Afghanistan; he was held in this CIA facility until May 28, 2004, when he was transported to Albania and released in a remote area; and Albanian officials then picked him up and took him to an airport in Tirana, Albania, from which he traveled to his home in Germany. The Complaint asserted that El-Masri had not only been held against his will, but had also been mistreated in a number of other ways during his detention, including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government. El-Masri alleged that his detention and interrogation were

> carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as "extraordinary rendition": the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.

Complaint ¶ 3.

According to the Complaint, the corporate defendants provided the CIA with an aircraft and crew to transport El-Masri to Afghanistan, pursuant to an agreement with Director Tenet, and they either

knew or reasonably should have known that "Mr. El-Masri would be subjected to prolonged arbitrary detention, torture and cruel, inhuman, or degrading treatment in violation of federal and international laws during his transport to Afghanistan and while he was detained and interrogated there." Complaint ¶ 61. El-Masri also alleges that CIA officials "believed early on that they had the wrong person," and that Director Tenet was notified in April 2004 that "the CIA had detained the wrong person" in El-Masri. *Id.* ¶ 43.

The Complaint alleged three separate causes of action. The first claim was against Director Tenet and the unknown CIA employees, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) for violations of El-Masri's Fifth Amendment right to due process. Specifically, El-Masri contends that Tenet and the defendant CIA employees contravened the Due Process Clause's prohibition against subjecting anyone held in United States custody to treatment that shocks the conscience or depriving a person of liberty in the absence of legal process. El-Masri's second cause of action was initiated pursuant to the Alien Tort Statute (the "ATS"), and alleged that each of the defendants had contravened the international legal norm against prolonged arbitrary detention. The third cause of action was also asserted under the ATS, and maintained that each defendant had violated international legal norms prohibiting cruel, inhuman, or degrading treatment.

On March 8, 2006, the United States filed a Statement of Interest in the underlying proceedings, pursuant to 28 U.S.C. § 517, and interposed a claim

of the state secrets privilege.[14] The then Director of the CIA, Porter Goss, submitted two sworn declarations to the district court in support of the state secrets privilege claim. The first declaration was unclassified, and explained in general terms the reasons for the United States' assertion of privilege. The other declaration was classified; it detailed the information that the United States sought to protect, explained why further court proceedings would unreasonably risk that information's disclosure, and spelled out why such disclosure would be detrimental to the national security (the "Classified Declaration"). Along with its Statement of Interest, the United States filed a motion to stay the district court proceedings pending resolution of its privilege claim; the next day, March 9, 2006, the court granted the requested stay. On March 13, 2006, the United States formally moved to intervene as a defendant in the district court proceedings. Contemporaneous with seeking to intervene as a defendant, the United States moved to dismiss the Complaint, contending that its interposition of the state secrets privilege precluded the litigation of El-Masri's causes of action.

El-Masri responded that the state secrets doctrine did not necessitate dismissal of his Complaint, primarily because CIA rendition operations, including El-Masri's alleged rendition, had been widely discussed in public forums. In support of this contention, Steven Macpherson Watt, a human rights adviser to the American Civil Liberties Union, filed a sworn declaration in the

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[14] Pursuant to 28 U.S.C. § 517, "any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

district court, dated April 7, 2006, in which he asserted that United States officials - including Secretary of State Condoleezza Rice, White House Press Secretary Scott McClellan, and Directors Tenet and Goss - had publicly acknowledged that the United States had conducted renditions.[15] Watt also observed that international human rights organizations had issued statements on various United States rendition operations, including El-Masri's alleged rendition, and that at least one such release had described the use of privately owned aircraft in the renditions of El-Masri and others. Additionally, according to Watt, the European Parliament and the Council of Europe had commenced investigations into possible European cooperation in United States renditions, and similar inquiries were pending in eighteen European countries.

Watt further asserted that "[m]edia reports on the rendition program generally, and Mr. El-Masri's rendition specifically, are too numerous to assemble." Watt Declaration ¶ 26. According to Watt, these media reports revealed the existence of secret CIA detention facilities where some rendition subjects were held, as well as the United States' "modus operandi" for conducting renditions: "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away." *Id.* ¶ 26(vi). And, Watt represented, the news media had documented some of the details of El-Masri's alleged rendition, including the underlying "decision-making process" and the roles of the German and Macedonian governments. *Id.* ¶ 26(viii).

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[15] The Watt Declaration is found in the Joint Appendix at J.A. 191-210.

On May 12, 2006, after receiving the parties' memoranda and declarations, and after oral argument of the matter, the district court concluded that the claim of the state secrets privilege was valid, and that, "given the application of the privilege to this case, the United States' motion to dismiss must be . . . granted." *See* Order, 437 F. Supp. 2d at 541. El-Masri has appealed from the Order and corresponding judgment of dismissal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

B.

We review de novo a district court's "legal determinations involving state secrets," including its decision to grant dismissal of a complaint on state secrets grounds. *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005).

C.

In the period after the district court's dismissal of El-Masri's Complaint, his alleged rendition - and the rendition operations of the United States generally - have remained subjects of public discussion. In El-Masri's view, two additions to the body of public information on these topics are especially significant in this appeal. First, on June 7, 2006, the Council of Europe released a draft report on alleged United States renditions and detentions involving the Council's member countries. This report concluded that El-Masri's account of his rendition and confinement was substantially accurate. Second, on September 6, 2006, in a White House address, President Bush publicly disclosed the existence of a CIA program in which suspected terrorists are

detained and interrogated at locations outside the United States. The President declined, however, to reveal any of this CIA program's operational details, including the locations or other circumstances of its detainees' confinement.

II.

El-Masri maintains on appeal that the district court misapplied the state secrets doctrine in dismissing his Complaint without requiring any responsive pleadings from the defendants or permitting any discovery to be conducted. Importantly, El-Masri does not contend that the state secrets privilege has no role in these proceedings. To the contrary, he acknowledges that at least some information important to his claims is likely to be privileged, and thus beyond his reach. But he challenges the court's determination that state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure. As explained below, we conclude that the district court correctly assessed the centrality of state secrets in this dispute. We therefore affirm its Order and the dismissal of El-Masri's Complaint.

A.

1.

Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *Reynolds*, the Supreme Court's leading

decision on the state secrets privilege, established the doctrine in its modern form. There, an Air Force B-29 bomber had crashed during testing of secret electronic equipment, killing three civilian observers who were on board. Their widows sued the United States under the Federal Tort Claims Act, and they sought discovery of certain Air Force documents relating to the crash. The Air Force refused to disclose the documents and filed a formal "Claim of Privilege," contending that the plane had been on "a highly secret mission of the Air Force," and that disclosure of the requested materials would "seriously hamper[] national security, flying safety and the development of highly technical and secret military equipment." *Id.* at 4-5.

The Court sustained the Air Force's refusal to disclose the documents sought by the plaintiffs, concluding that the officials involved had properly invoked the "privilege against revealing military secrets." 345 U.S. at 6-7. This state secrets privilege, the Court observed, was "well established in the law of evidence." *Id.* The Court relied in part on Greenleaf's classic evidence treatise, which traced the recognition of a privilege for state secrets to the 1807 treason trial of Aaron Burr. *See* I Simon Greenleaf & John Henry Wigmore, *A Treatise on the Law of Evidence* § 251 n.5 (16th ed. 1899); *United States v. Burr*, 25 F. Cas. 30, 37 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692D) (observing that, in appropriate circumstances, government may refuse to disclose confidential state matters in judicial proceedings). The *Reynolds* Court also reviewed a long line of decisions, both American and English, that had recognized and refined a privilege for state secrets. These included *Totten v. United States*, where, in 1875, the Supreme Court affirmed the

dismissal of an action for breach of a secret espionage contract, concluding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. 105, 107 (1875).

Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets. *See* 345 U.S. at 6. In *United States v. Nixon,* the Court further articulated the doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns "areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. 683, 710 (1974). The Nixon Court went on to recognize that, to the extent an executive claim of privilege "relates to the effective discharge of a President's powers, it is constitutionally based." *Id.* at 711. Significantly, the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs. The Court accordingly has indicated that the judiciary's role as a check on presidential action in foreign affairs is limited. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (recognizing judiciary's "customary policy of deference to the President in matters of foreign affairs"); *Chi. & S. Air Lines, Inc. v. Waterman S.S.*

*Corp.*, 333 U.S. 103, 111 (1948) (prescribing limited judicial role in foreign policy matters, especially those involving "information properly held secret"). Moreover, both the Supreme Court and this Court have recognized that the Executive's constitutional mandate encompasses the authority to protect national security information. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (observing that "authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief"); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces."). The state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.

2.

A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis. At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

a.

The procedural requirements for invoking the state secrets privilege are set forth in *Reynolds*, which derived them largely from prior decisions on the subject. First, the state secrets privilege must be asserted by the United States. *See* 345 U.S. at 7, 73. It "belongs to the Government and . . . can neither be claimed nor waived by a private party." *Id.* Second, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter." *Id.* at 7-8, 73. Third, the department head's formal privilege claim may be made only "after actual personal consideration by that officer." *Id.* at 8. *Reynolds* emphasized that the state secrets privilege "is not to be lightly invoked," and the foregoing constraints on its assertion give practical effect to that principle. *Id.* at 7.

b.

After a court has confirmed that the *Reynolds* procedural prerequisites are satisfied, it must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure. This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security. The *Reynolds* Court recognized this tension, observing that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" - no matter how great the interest in national security - but that the President's ability to preserve state secrets likewise cannot be placed entirely at the mercy of the courts. 345 U.S. at 9-10. Moreover, a court evaluating a claim of privilege must "do so without forcing a disclosure of the very thing the privilege is designed to protect."

The *Reynolds* Court balanced those concerns by leaving the judiciary firmly in control of deciding whether an executive assertion of the state secrets privilege is valid, but subject to a standard mandating restraint in the exercise of its authority. A court is obliged to honor the Executive's assertion of the privilege if it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the "utmost deference" to the responsibilities of the executive branch. *Nixon*, 418 U.S. at 710. Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information. In the related context of confidentiality classification decisions, we have observed that "[t]he courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which "[t]he significance of one item of information may frequently depend upon knowledge of many other items of information," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its

proper context." *Id.* In the same vein, in those situations where the state secrets privilege has been invoked because disclosure risks impairing our foreign relations, the President's assessment of the diplomatic situation is entitled to great weight.

The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met. A court considering the Executive's assertion of the state secrets privilege, however, must take care not to "forc[e] a disclosure of the very thing the privilege is designed to protect" by demanding more information than is necessary. *Reynolds*, 345 U.S. at 8. Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (relying on declarations of CIA Director); *Reynolds,* 345 U.S. at 5 (relying on Claim of Privilege by Secretary of Air Force and affidavit of Air Force Judge Advocate General). In some situations, a court may conduct an in camera examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled. *See Sterling*, 416 F.3d at 345. The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it. *See Reynolds*, 345 U.S. at 11. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted...." *Id.* On the other hand, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* Indeed, in certain circumstances a court may conclude that an explanation by the

Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. *See id.* at 9. In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand. *See id.*

After information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure - even for the purpose of in camera examination by the court. On this point, *Reynolds* could not be more specific: "When . . . the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. Moreover, no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely. *See id.* at 11.

c.

The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if " 'the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy." *Sterling*, 416 F.3d at 348 (quoting *DTM Research, LLC v. AT & T Corp.*, 245 F.3d 327, 334 (4th Cir.2001)). The Supreme Court has

recognized that some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked. *See Totten*, 92 U.S. at 107; *Reynolds*, 345 U.S. at 11 n. 26. Although *Totten* has come to primarily represent a somewhat narrower principle - a categorical bar on actions to enforce secret contracts for espionage - it rested, as we have already observed, on the proposition that a cause cannot be maintained if its trial would inevitably lead to the disclosure of privileged information. *See* 92 U.S. at 107. And in *Reynolds,* while concluding that dismissal was unnecessary because the privileged information was peripheral to the plaintiffs' action, the Court made clear that where state secrets form the very subject matter of a court proceeding, as in *Totten,* dismissal at the pleading stage - "without ever reaching the question of evidence" - is appropriate. *See* 345 U.S. at 11 n. 26. In a recent decision unanimously reaffirming *Totten's* validity, the Supreme Court approvingly quoted *Reynolds's* discussion of *Totten* as a matter in which dismissal on the pleadings was appropriate because the very subject matter of the action was a state secret. *See Tenet v. Doe*, 544 U.S. 1, 9 (2005).

Our own decisions applying the state secrets privilege have also recognized that, in certain proceedings, the unavailability of privileged state secrets as evidence will necessarily lead to dismissal. In *Farnsworth Cannon, Inc. v. Grimes*, an action alleging tortious interference with a classified contract to perform services for the Navy, our en banc Court affirmed the district court's dismissal on state secrets grounds. *See* 635 F.2d 268 (4th Cir. 1980). We reasoned that privileged secrets were so central to the dispute that "[i]n an attempt to make out a prima facie case during an actual trial, the plaintiff and its

lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit." *Id.* at 281. "Such probing in open court," we concluded, "would inevitably be revealing," and dismissal was therefore warranted. *Id.*

In *Fitzgerald v. Penthouse International, Ltd.*, in 1985, we affirmed the district court's dismissal, under the state secrets doctrine, of an action alleging that a magazine article on the Navy's classified marine mammal program had libelously accused the plaintiff of espionage. *See* 776 F.2d 1236, 1237 - 38 (4th Cir. 1985). There, the Secretary of the Navy had filed a public declaration asserting that the plaintiff's plan to call witnesses with knowledge of the Navy's classified program risked the disclosure of military secrets, since those witnesses could be questioned about the secret information to which they were privy. *See id.* at 1242. In addition, the Secretary filed a separate, classified declaration that elaborated on his reasons for asserting the state secrets privilege in the case. *See id.* at 1243 n.9. From all the circumstances, we concluded that "there was simply no way this particular case could be tried without compromising sensitive military secrets," and ruled that the district court had not erred in dismissing it. *Id.* at 1243.

More recently, in our 2005 *Sterling* decision, we affirmed the dismissal of a Title VII action initiated by an African-American CIA officer alleging unlawful discriminatory practices by CIA management. *See* 416 F.3d at 341. We concluded that state secrets were so central to that proceeding that it could not be litigated given the Executive's invocation of the privilege. *Id.* at 346-48. The evidence in the dispute would have consisted primarily of documents and testimony regarding the

assignments and performance evaluations of CIA operatives, and many of the necessary witnesses were individuals whose very identities were state secrets. *Id.* at 347-48. Indeed, as Judge Wilkinson explained, "the whole object of the suit and of the discovery [was] to establish a fact that is a state secret--namely, the methods and operations of the Central Intelligence Agency." *Id.* at 348 (internal quotation marks and citation omitted). In those circumstances, dismissal was deemed appropriate.

Our sister circuits have likewise recognized that the unavailability of privileged information may, in some instances, necessarily lead to dismissal. *See Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming dismissal, on state secrets grounds, of action alleging that Air Force had unlawfully handled hazardous waste in classified operating area); *Black v. United States*, 62 F.3d 1115, 1118-19 (8th Cir. 1995) (affirming dismissal, on state secrets grounds, of action alleging that executive branch officials had engaged in "campaign of harassment and psychological attacks" against plaintiff); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992) (affirming dismissal, on state secrets grounds, of action alleging manufacturing and design defects in military weapons system); *Halkin v. Helms*, 690 F.2d 977, 981 (D.C. Cir. 1982) (affirming dismissal, on state secrets grounds, of action alleging unlawful CIA surveillance); *cf. Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004) (affirming summary judgment because no defense was available without resort to privileged state secrets).

To summarize, our analysis of the Executive's interposition of the state secrets privilege is governed primarily by two standards. First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged. *See Reynolds*, 345 U.S. at 10. Second, a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure. *See Sterling*, 416 F.3d at 348; *see also Reynolds*, 345 U.S. at 11 n. 26; *Totten*, 92 U.S. at 107. With these controlling principles in mind, and being cognizant of the delicate balance to be struck in applying the state secrets doctrine, we proceed to our analysis of El-Masri's contentions.

B.

1.

The question before us is whether the facts of this proceeding satisfy the governing standard for dismissal of an action on state secrets grounds, as the district court ruled.[16] El-Masri essentially accepts the legal framework described above. He acknowledges that the state secrets doctrine protects sensitive military intelligence information from disclosure in court proceedings, and that dismissal at the pleading stage is appropriate if state secrets are so central to a

[16] El-Masri does not dispute that the procedural requirements for asserting the state secrets privilege have been satisfied here.

proceeding that it cannot be litigated without threatening their disclosure. El-Masri contends, however, that the facts that are central to his claim are not state secrets, and that the district court thus erred in dismissing his Complaint.

a.

The heart of El-Masri's appeal is his assertion that the facts essential to his Complaint have largely been made public, either in statements by United States officials or in reports by media outlets and foreign governmental entities. He maintains that the subject of this action is simply "a rendition and its consequences," and that its critical facts - the CIA's operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein - have been so widely discussed that litigation concerning them could do no harm to national security. Appellant's Br. 38. As a result, El-Masri contends that the district court should have allowed his case to move forward with discovery, perhaps with special procedures imposed to protect sensitive information.

El-Masri's contention in that regard, however, misapprehends the nature of our assessment of a dismissal on state secrets grounds. The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it. El-Masri is therefore incorrect in contending that the central facts of this proceeding are his allegations that

he was detained and interrogated under abusive conditions, or that the CIA conducted the rendition program that has been acknowledged by United States officials. Facts such as those furnish the general terms in which El-Masri has related his story to the press, but advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law. If El-Masri's civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. With regard to Director Tenet, for example, El-Masri would be obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him. With respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*. *See Totten v. United States*, 92 U.S. 105, 107 (1875) (establishing absolute bar to enforcement of confidential agreements to conduct espionage, on ground that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"); *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (reaffirming

*Totten* in unanimous decision). Even marshalling the evidence necessary to make the requisite showings would implicate privileged state secrets, because El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security. *See Sterling*, 416 F.3d at 347 ("[T]he very methods by which evidence would be gathered in this case are themselves problematic.").

b.

Furthermore, if El-Masri were somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence. The main avenues of defense available in this matter are to show that El-Masri was not subject to the treatment that he alleges; that, if he was subject to such treatment, the defendants were not involved in it; or that, if they were involved, the nature of their involvement does not give rise to liability. Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence. If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged. Alternatively, if the CIA detained El-Masri, but did so without Director Tenet's active involvement, effective proof thereof would

require a detailed explanation of how CIA operations are supervised. Similarly, although an individual CIA officer might demonstrate his lack of involvement in a given operation by disclosing that he was actually performing some other function at the time in question, establishing his alibi would likely require him to reveal privileged information.

Moreover, proof of the involvement - or lack thereof - of particular CIA officers in a given operation would provide significant information on how the CIA makes its personnel assignments. Similar concerns would attach to evidence produced in defense of the corporate defendants and their unnamed employees. And, like El-Masri's prima facie case, any of the possible defenses suggested above would require the production of witnesses whose identities are confidential and evidence the very existence of which is a state secret. We do not, of course, mean to suggest that any of these hypothetical defenses represents the true state of affairs in this matter, but they illustrate that virtually any conceivable response to El-Masri's allegations would disclose privileged information.

c.

It is clear from precedent that the "central facts" or "very subject matter" of a civil proceeding, for purposes of our dismissal analysis, are those facts necessary to litigate it - not merely to discuss it in general terms. In *Bareford v. General Dynamics Corp.*, several plaintiffs who had been injured or whose decedents had died in the 1987 missile attack on the U.S.S. Stark in the Persian Gulf initiated an action against the manufacturers of the vessel's weapons system, alleging that the system had been

defectively manufactured and designed. *See* 973 F.2d 1138, 1140 (5th Cir. 1992). Those allegations, like El-Masri's, could be set forth without revealing state secrets; the plaintiffs' assertion that a Navy weapons system was defective was not, in itself, detrimental to national security. The facts central to the resolution of the proceeding, however, were whether the weapons system was intended to destroy the missile that struck the Stark and, if so, why it failed. Those critical factual questions could not be answered, the Fifth Circuit concluded, without threatening disclosure of privileged state secrets, and thus dismissal was appropriate. *See id.* at 1143-44.

Similarly, in *Black v. United States*, the plaintiff alleged that, after he had reported suspicious contact with a possible Soviet spy, the CIA, FBI, Department of Defense, and Department of State had subjected him to a "campaign of harassment and psychological attacks." 62 F.3d 1115, 1116 (8th Cir. 1995). Black claimed that employees of those agencies had followed him, subjected him to strange telephone calls, broken into his apartment and rearranged things, broken into his car, and drugged him with a substance that produced terrifying hallucinations. *See id.* at 1116-17. The general subject matter of those allegations, like that of El-Masri's Complaint, could be discussed without revealing state secrets. Yet the Eighth Circuit concluded that dismissal was appropriate because the facts central to the actual litigation of Black's claims - the "identity of the alleged wrongdoers, their relationship to the government, and their contacts with Black" - were privileged. *Id.* at 1118-19.

In *Kasza v. Browner*, the plaintiffs alleged that the Air Force had contravened the Resource

Conservation and Recovery Act in its storage, treatment, and disposal of hazardous waste at a classified operating location near Groom Lake, Nevada. 133 F.3d 1159, 1164 (9th Cir. 1998). Their allegations could be explained without resort to state secrets; the revelation that the Air Force might have unlawfully handled its hazardous waste was not detrimental to national security. But because much of the specific information needed to litigate the plaintiffs' claims was privileged, the Ninth Circuit concluded that the "very subject matter of [the] action is a state secret," and "agree[d] with the district court that [the] action must be dismissed." *Id.* at 1170. Our own recent decision in *Sterling* involved a CIA officer's claim that he had been discriminated against because of his race. *See* 416 F.3d at 341. As in the decisions of our sister circuits discussed above, Sterling's allegations could be stated with no detrimental effect on national security; his assertion that the CIA had engaged in race discrimination compromised no confidential information. Yet we concluded that the very subject matter of his action, the facts central to its litigation, consisted of state secrets, because a judicial resolution of the matter would have required disclosure of how the CIA makes sensitive personnel decisions, and would have involved the production of witnesses whose very participation in a court proceeding would risk exposing privileged information. *See id.* at 347-48. We thus affirmed the dismissal of Sterling's action at the pleading stage. *See id.* at 348- 49.

In light of these decisions, we must reject El-Masri's view that the existence of public reports concerning his alleged rendition (and the CIA's rendition program in general) should have saved his Complaint from dismissal. Even if we assume,

arguendo, that the state secrets privilege does not apply to the information that media outlets have published concerning those topics, dismissal of his Complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action.[17] Rather, those central facts - the CIA means and methods that form the subject matter of El-Masri's claim - remain state secrets. Consequently, pursuant to the standards that El-Masri has acknowledged as controlling, the district court did not err in dismissing his Complaint at the pleading stage.

2.

El-Masri also contends that, instead of dismissing his Complaint, the district court should have employed some procedure under which state secrets would have been revealed to him, his counsel, and the court, but withheld from the public. Specifically, he suggests that the court ought to have received all the state secrets evidence in camera and under seal, provided his counsel access to it pursuant to a nondisclosure agreement (after arranging for necessary security clearances), and then conducted an in camera trial. We need not dwell long on El-Masri's proposal in this regard, for it is expressly foreclosed by *Reynolds,* the Supreme Court decision that controls this entire field of inquiry. *Reynolds* plainly held that when "the occasion for the privilege is

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[17] By no means do we endorse El-Masri's theory that publicly reported information concerning his alleged rendition is ineligible for protection under the state secrets doctrine simply because it has been published in the news media. We need not address his contention in that regard, however, because his appeal would fail even if we were to accept it.

appropriate . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. El-Masri's assertion that the district court erred in not compelling the disclosure of state secrets to him and his lawyers is thus without merit.

C.

In addition to his analysis under the controlling legal principles, El-Masri presents a sharp attack on what he views as the dire constitutional and policy consequences of dismissing his Complaint. He maintains that the district court's ruling, if affirmed, would enable the Executive to unilaterally avoid judicial scrutiny merely by asserting that state secrets are at stake in a given matter. More broadly, he questions the very application of the state secrets doctrine in matters where "egregious executive misconduct" is alleged, contending that, in such circumstances, the courts' "constitutional duty to review executive action" should trump the procedural protections traditionally accorded state secrets. Appellant's Br. 10.

Contrary to El-Masri's assertion, the state secrets doctrine does not represent a surrender of judicial control over access to the courts. As we have explained, it is the court, not the Executive, that determines whether the state secrets privilege has been properly invoked. In order to successfully claim the state secrets privilege, the Executive must satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret. Similarly, in order to win dismissal of an action on

state secrets grounds, the Executive must persuade the court that state secrets are so central to the action that it cannot be fairly litigated without threatening their disclosure. The state secrets privilege cannot be successfully interposed, nor can it lead to dismissal of an action, based merely on the Executive's assertion that the pertinent standard has been met.

In this matter, the reasons for the United States' claim of the state secrets privilege and its motion to dismiss were explained largely in the Classified Declaration, which sets forth in detail the nature of the information that the Executive seeks to protect and explains why its disclosure would be detrimental to national security. We have reviewed the Classified Declaration, as did the district court, and the extensive information it contains is crucial to our decision in this matter. El-Masri's contention that his Complaint was dismissed based on the Executive's "unilateral assert[ion] of a need for secrecy" is entirely unfounded. It is no doubt frustrating to El-Masri that many of the specific reasons for the dismissal of his Complaint are classified. An inherent feature of the state secrets privilege, however, is that the party against whom it is asserted will often not be privy to the information that the Executive seeks to protect. That El-Masri is unfamiliar with the Classified Declaration's explanation for the privilege claim does not imply, as he would have it, that no such explanation was required, or that the district court's ruling was simply an unthinking ratification of a conclusory demand by the executive branch. We also reject El-Masri's view that we are obliged to jettison procedural restrictions - including the law of privilege - that might impede our ability to act as a check on the Executive. Indeed, El-Masri's position in that regard fundamentally misunderstands the

nature of our relationship to the executive branch. El-Masri envisions a judiciary that possesses a roving writ to ferret out and strike down executive excess. Article III, however, assigns the courts a more modest role: we simply decide cases and controversies. Thus, when an executive officer's liability for official action can be established in a properly conducted judicial proceeding, we will not hesitate to enter judgment accordingly. But we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us - especially when the challenged action pertains to military or foreign policy. We decline to follow such a course, and thus reject El-Masri's invitation to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line.[18]

D.

As we have observed in the past, the successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted. *See Sterling*, 416 F.3d at 348 ("We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear."). That party loses access to evidence that he needs to prosecute his action and, if privileged

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[18] A group of former diplomats and State Department officials have submitted a brief in this matter as amici curiae. The amici emphasize that it is important, as a matter of foreign policy, to provide a forum for claims of civil and human rights violations. Even if we were to conclude, however, that protecting national security is less important than litigating the merits of El-Masri's claim, we are not at liberty to abrogate the state secrets doctrine on that basis.

state secrets are sufficiently central to the matter, may lose his cause of action altogether. Moreover, a plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security. *See id.* ("[T]here can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk."); *Fitzgerald*, 776 F.2d at 1238 n. 3 ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants - through the loss of important evidence or dismissal of a case - in order to protect a greater public value").[19] In view

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[19] It should be unnecessary for us to point out that the Executive's authority to protect confidential military and intelligence information is much broader in civil matters than in criminal prosecutions. The Supreme Court explained this principle in *Reynolds*, observing:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

345 U.S. at 12. El-Masri's reliance on our decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), in which we required the United States to grant a criminal defendant substantial access to enemy-combatant witnesses whose very identities were highly classified, is thus misplaced.

of these considerations, we recognize the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint, and reiterate our past observations that dismissal on state secrets grounds is appropriate only in a narrow category of disputes. *See Sterling*, 416 F.3d at 348; *Fitzgerald*, 776 F.2d at 1241-42. Nonetheless, we think it plain that the matter before us falls squarely within that narrow class, and we are unable to find merit in El-Masri's assertion to the contrary.

III.

Pursuant to the foregoing, we affirm the Order of the district court. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).[20]

*AFFIRMED*

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[20] On July 17, 2006, the United States filed a motion for expedited in camera/ex parte review of the Classified Declaration. By Order dated August 19, 2006, we deferred consideration of that motion. We now deny the motion as moot.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| Khaled El-Masri, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:05cv1417-TSE-TRJ |
| | ) | |
| George Tenet, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

FORMAL CLAIM OF STATE SECRETS PRIVILEGE BY PORTER J. GOSS, DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I, PORTER J. GOSS, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 21 April 2005. I represented the 14th Congressional District of Florida as a Member of the U.S. House of Representatives from 3 January 1989 to 23 September 2004. During that time, I served on the Permanent Select Committee on Intelligence of the U.S. House of Representatives (HPSCI) from February 1995 until August 2004. From February 1997 until the President of the United States announced his intention to nominate me as Director of Central Intelligence (DCI) in September 2004, I served as Chairman of the HPSCI. I was confirmed

by the Senate as DCI on 23 September 2004, was sworn in as DCI on 24 September 2004, and served in that capacity until 21 April 2005, when the Director of National Intelligence was sworn into office. Prior to my service in the U.S. House of Representatives, I served as an officer of the CIA in the Directorate of Plans and Programs, the predecessor to the Directorate of Operations.

2. This declaration is a formal claim of the state secrets privilege. I respectfully request that the Court consider this declaration and, more particularly, my classified declaration discussed below before this case proceeds further. At my request, the Department of Justice (DOJ) is filing a motion for an immediate stay of proceedings in conjunction with the filing of this claim of privilege.

3. I make the following statements based upon my personal knowledge, as well as upon information made available to me in my official capacity.

4. The CIA was established by section 104(a) of the National Security Act of 1947 (Act), as amended, 50 U.S.C. § 403-4. Pursuant to section 104(b) of the Act, 50 U.S.C. § 403-4(b), the function of the CIA is to assist the Director of the CIA (DCIA) in carrying out his assigned responsibilities. Section 104A of the Act, 50 U.S.C. § 403-4a, established the position of DCIA, whose duties and responsibilities include serving as head of the CIA and collecting information through human sources and by other appropriate means, correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence, providing overall direction for coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to

undertake such collection, and performing such other functions and duties related to intelligence affecting the national security as the President, or the DNI, may direct. A more particularized statement of the authorities of the DCIA and the CIA is set forth in sections 1.5 and 1.8 of Executive Order 12333.[21]

5. Under the direction of the DNI pursuant to section 102A(i) of the Act, 50 U.S.C. § 403-1(i), and in accordance with section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g, and sections 1.3(a)(5) and 1.5(h) of Executive Order 12333, I additionally am responsible for protecting CIA sources and methods from unauthorized disclosure.

6. Through the exercise of my official duties, I have been advised of this litigation. I understand that the plaintiff alleges that he was detained by officials of the Government of Macedonia; that those officials handed him over to CIA officials; that those CIA officials transported him to Afghanistan; that Afghan and CIA officials detained and interrogated him; that the conditions of his confinement inhumane and his interrogation was coercive; and that after several months he was released in Albania. I am further advised that plaintiff seeks money damages in his lawsuit from former DCI George J. Tenet and three corporate defendants. I also understand that the complaint refers to unnamed individuals who are said to be employees of the CIA or of the corporate defendants, and who the plaintiff states he will try to identify and name as additional defendants.

7. Central to this case is the allegation that the CIA conducted a clandestine foreign intelligence

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[21] Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C.A. § 401 note at 21 (Supp. 2005), and as amended by Executive Order 13284, 68 Fed. Reg. 4,077 (Jan. 28, 2003).

activity. By their very nature, clandestine intelligence activities are not acknowledged by the United States. When there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations. There is a pragmatic reason why this is necessary, that is, to protect classified intelligence sources and methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs, a position which I understand my predecessors have taken since the CIA's inception and one which also reflects my personal judgment.

8. Confirming the existence of an alleged clandestine intelligence activity would reveal the very classified information sought to be protected from disclosure. The United States does not, however, have the luxury of denying unfounded allegations of clandestine intelligence activities without serious adverse consequence. The denial of CIA involvement may, by itself, provide the informed intelligence analyst useful information about the CIA's capabilities and the scope and thrust of CIA activities. Even where that is not the case, the United States cannot simply deny the existence of such activities where none exist. If that were the policy, the United States' failure to deny such activities in other circumstances would be tantamount to an admission of such clandestine activities in these other circumstances. Therefore, the United States and current and former CIA officers, such as Director Tenet, must take the consistent position of refusing to confirm or deny allegations relating to unacknowledged intelligence activities.

9. With these considerations in mind, I hereby submit this declaration to formally assert a claim of state secrets privilege. I make this claim of state

secrets privilege in my capacity as the head of the CIA, after personal consideration of the matter. In view of the allegations of CIA involvement, parties in this case have a special incentive to probe the CIA's foreign intelligence interests, authorities, and methods generally, and prefer seek information and evidence to establish or refute claims and defenses. The information that underlies my judgment that special procedures are not adequate to protect these sensitive matters cannot be described on the public record and, accordingly, is included in a separate, classified declaration.

10. In connection with my formal assertion of the state secrets privilege, I have considered the extent to which the bases for my assertion could be filed on the public record. After careful consideration, I have determined that no further information regarding the bases for my claim of privilege can be disclosed on the public record without revealing the very information I seek to protect. The full scope of the information protected by the claim of privilege is itself privileged from disclosure. Accordingly, my description of the scope of information protected by the privilege and the bases for my determination are contained in my classified declaration, which is submitted for this Court's *in camera, ex parte* review as a part of this claim of privilege. I have asked DOJ to seek an immediate stay of these proceedings to permit the Court the opportunity to consider my assertion of state secrets privilege before the defendants are required to respond to the complaint or any other proceedings occur in this case.

11. I have requested government attorneys to seek dismissal of this case in view of this claim of state secrets privilege. I recognize that dismissal is an extreme form of relief. Nevertheless, I have asked

DOJ to seek dismissal of this case because, after consulting with CIA and DOJ officials, I have determined that there are no adequate means to allow this case to proceed while protecting the national security interests addressed in my separate classified declaration.

12. My classified declaration will be delivered to a DOJ Security Officer who will assist in delivery and storage as the Court may require. In this regard, it is my understanding that the Classified Information Procedures Act (CIPA) does not govern this civil proceeding, and the DOJ Security Officer will not perform the additional responsibilities as a Court Security Officer under the Chief Justice's CIPA guidelines.

13. In consideration of my responsibility as DCIA to protect CIA activities, sources, and methods, I have determined that neither plaintiff nor his attorneys possess the need-to-know required to access the classified information described in this declaration. Section 4.1 of Executive Order 12958 provides that "[a] person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or an agency head's designee;
(2) the person has signed an approved nondisclosure agreement; and
(3) the person has a need-to-know the information."

Section 6.1(z) defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." I understand that one or more

of the attorneys representing the plaintiff may have been granted limited access to certain classified national security information in connection with their representation of detainees who have brought petitions for writs of habeas corpus based upon their detention by the U.S. military at the U.S. Naval Station Guantanamo Bay, Cuba. The Executive Branch's decision to grant such attorneys limited access to certain classified information directly relating to particular petitioners did not displace the DCIA's obligation to protect intelligence sources and methods from unauthorized disclosure. The substance of the information disclosed to petitioner's counsel in those proceedings, while classified, related only to the detainees on whose behalf the attorneys are appearing.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of March, 2006.

s/Porter J. Goss
Director
Central Intelligence Agency

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| Khaled El-Masri, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:05cv1417-TSE-TRJ |
| | ) | |
| George Tenet, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

DECLARATION OF KHALED EL-MASRI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Khaled El-Masri, of Senden, Germany under penalty of perjury under the laws of the United States of America, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I was born in Kuwait on June 29, 1963. Both of my parents are Lebanese. I fled Lebanon in 1985 during the civil war and sought asylum in Germany. Before my asylum application was processed I married my first wife, a German citizen. We lived together for ten years, and were married for seven.

2. In 1995, I renounced my Lebanese citizenship, acquired by virtue of the nationality of my parents, and took up German citizenship. After my first

marriage ended in divorce, I re-married in 1996. My second wife is Lebanese. Together we have four young children, ages three, five, seven, and eight years old, and a baby of 7 months.

3. I trained as a carpenter when I first came to Germany. I then began working as a truck driver and subsequently as a car salesman. Around late 2003 and early 2004, I was made redundant from the car dealership. Since then I have been continuously unemployed and dependent on unemployment assistance.

4. In the last few months of 2003, my wife and I had been experiencing marital problems. These problems were made worse by our living conditions. At this point I was unemployed and was living together with my wife and four young children in a one-room apartment. By December of that year, things had gotten so bad that I felt I just had to leave home for a while to get my head together.

5. I decided to travel to Macedonia. ADAC (a German automobile club, similar to AAA in the United States, I understand) informed me that the cost of living there was inexpensive and that hotel rooms were easy and cheap to come by. I made some initial inquiries with a bus company in Ulm that runs direct connections between Ulm and Skopje, Macedonia.

6. On December 30, 2003, I purchased a round-trip bus ticket from Ulm to Skopje. When I purchased the ticket I had no set plans as to how long I was going to stay there, but I planned on remaining for at least a week before returning home again.

7. The bus left Ulm as scheduled on December 30. We traveled without incident through Germany, Austria, Slovenia, Croatia, and Serbia.

8. Around 3 p.m. on December 31, 2003, the bus arrived at the border between Serbia and Macedonia. As with all other border crossings we

made during the trip, at the check point the bus driver collected all the passengers' passports, mine included, to take to the border police for examination. After our papers were checked, everyone, except me, had their passport returned to them. The bus driver approached me and asked me to get off the bus and meet with the border official. The official asked me a few routine questions. First, he asked where exactly I was going to stay in Macedonia. I replied that I intended to find a hotel once I arrived, and that I had no specific one in mind. He then asked me about the purpose of my stay in Macedonia. I said I was on a tourist trip and had planned to stay for about a week. He told me that as soon as I arrived in Skopje, I should go and see the local police. As I did not speak any Macedonian, a fellow traveler translated for me and for the border official. The translator was tall, slim, and appeared to me to me in his mid to late forties. After these few questions the official instructed me to return to the bus. The bus driver stayed with him for a brief moment before returning to the bus.

9. The bus then drove on towards Skopje. After about 3 kilometers or so, I asked the bus driver if he could return my passport. He told me that he didn't have it and that he thought it must still be with the border officials. The driver turned the bus around and drove back to the border, where I got down off the bus and asked the border official for my passport. The official said that there was a problem with my passport, and resolving it might take some time. He suggested that I remain behind and let the bus continue on. He said that after we had resolved the passport issue, he would drop me off at a hotel in Skopje. The bus drove on without me. I had to then hang around waiting until about 6 p.m.

10. At this time I was taken to a narrow room,

about eight meters from the border station. The room had a door and a big glass window facing the street where cars drove by. In the room there was a table, a desk, and a chair. I sat down on the chair with my back to the glass window. The official did not allow me to turn around. He also told me to put every item I carried with me on the table. Afterwards he searched everything thoroughly. Once he had completed the search, a young man appeared. He was about 1.75 m tall and looked to be in his early 30s.

11. After an hour-long interrogation, another man turned up. He was a little bigger and also appeared to be around 30 years old. He started a second interrogation, mentioning Islamic organizations and groups and asking whether I knew any of them. I said that I had heard of most of them. He then asked if I had anything to do with any of them. I replied that I had no involvement or even contact with any of them. He continued to question me about Ulm, asking me if there were any mosques in the area near where I lived, how many people attended their services, what nationalities they were, and if I had ever invited someone to Islamic activities at the Mosque or if someone had ever invited me to them. I answered no to all these questions. I was asked if there were any other activities in mosques apart from Friday services, and if I knew of any non-Muslims that had converted to Islam. He offered me alcohol, presumably to test whether I drank alcohol. I declined. He asked me if I prayed or fasted. I replied, "sometimes."

12. The interrogation ended around 10 p.m. By this stage, some of the officers had gotten drunk; in less than 2 hours, the New Year would begin.

13. I was eventually taken out of the office and led on to the road leading towards Serbia. I saw three vehicles there, all without license plates. Two of

them were VW Golfs: one red, one black. The third car was also black but I cannot remember the make. It was very dark and the fog was thick. The streets and the border station were deserted. My escorts were all dressed in plain clothes and were armed with guns. On our way, we saw a police barricade. We were allowed to pass quickly through it without stopping when my escort turned on a blue signal light.

14. In Skopje I was taken to a hotel. I subsequently discovered the name of the hotel: The Skopski Merak. The hotel has a website: http://www.skopskimerak.com.mk/, which I have looked at.

15. My escorts quickly walked me inside the hotel, and over to the elevator, situated a few meters away on the left side of the entrance. The elevator was very small. It could fit only two people at a time. One of my escorts and I took the elevator. The rest of the men took the stairs.

16. The hotel building had four or five floors. We exited on the top floor and walked into the room located opposite the elevator. Immediately on the left side of the entrance to the room was the bathroom. It had a window, approximately eighty by forty cm, and a Jacuzzi. Between the sink and the Jacuzzi was the toilet. On the right side of the room was a double bed next to a large window with a view toward the inside of the hotel. Opposite the entrance there was a large table with a computer and an internet connection. To the left of it was a television mounted to the ceiling. There was a second window with a view onto the slightly damaged chimney of a tall building. Behind this building was another building and to the left, there was a view of a mountain with a cross visible on its summit. This window was alwa,s locked and covered by heavy blue curtains; between this window and the bed stood a small table with four chairs.

17. From the hotel website photographs, I can identify the actual room where I was held. From another, I even recognize one of the waiters who served me food during my detention there.

18. After entering the hotel room, three of my escorts remained with me. They locked the door. I asked them why they didn't leave. They said that they were going to be staying with me even when I was sleeping. I thought they just wanted to accompany me to my hotel and then leave me there as they said they would when I was detained at the border. I asked them if I was under arrest and they said that I wasn't, asking me if I saw any handcuffs on my wrists. They carried out another search of all my belongings. After this, three of them began interrogating me again. These interrogations were conducted in English despite the fact that I have only a very basic grasp of the language. The three men asked many questions all at once, speaking at me and firing questions from all sides of the room. The interrogation lasted until at least 3 a.m. the next morning.

19. The men conducted similar such interrogations for the next three days. They observed my every move at all times. Even when I went to the toilet they asked me to leave the door open, although it was located in the same room where I was staying. When I was exhausted and tired of answering their questions and after having been locked in this hotel room all this time, I demanded a translator, as I hardly spoke any English. Then I asked to call the German Embassy, a lawyer, and my family. All my requests were refused. At one point I became so angry that I demanded to be released and attempted to leave the room by force. During this particular incident, we all raised our voices, each of us speaking in our own language. Communication was clearly impossible.

One of the men pulled out his firearm and held it level with my head; the other two placed their hands on their holsters in a threatening manner.

20. The watch was divided between nine men; they changed shift every six hours. On the fifth day, a man with a bag appeared. He had sheets of paper and finger-print ink. He also had a camera and took a few photographs of me: right profile, left profile, and then frontal.

21. After about seven days, another official turned up. He appeared to be of a much higher rank than any of my guards. He looked to be around fifty-five years old. He had a large build and brought an assistant with him. He was very respectful. He asked me about my condition and how the food was. He told me that I could order food from any restaurant if I didn't like the food that was being served. He also asked if the guards had treated me well. I thanked him and said that so far I was fine. He then told me that he wanted to and could end my current situation, and that he had a deal to offer me. I asked him what kind of a deal. He replied that if I admitted that I belonged to the Al-Qaeda organization they would send me back to Germany with a police escort. I refused and he subsequently left.

22. Two or three days later, his assistant showed up again and presented me with a list of allegations. He told me that he was certain that these allegations were true. He added that based on these allegations the case against me was no longer within their control, and that it had been referred to the Macedonian president. He said that the president had made a decision regarding my continued detention.

23. I was surprised by this turn of events and asked again to meet with the German ambassador or any other German authority. He told me that the German government did not want anything to do with

me, and that I was wanted by them as well. One of the specific allegations against me was that my passport did not belong to me, and that I was wanted by both the Egyptian and German governments because I had been seen in Jalalabad, Afghanistan. After presenting me with these allegations, he left.

24. On the thirteenth day after my seizure, I began a hunger strike to protest my situation. A week later, I was told they would soon send me to the airport to fly me back to Germany. I did not eat again for the remaining ten days of detention in Macedonia.

25. At around 8 p.m. on the twenty-third day of my captivity, January 23, 2004, a video recoding was taken of me. I was instructed to state my full name, that I had been treated well, and that I would shortly be flown back to Germany. I was then accompanied out of the hotel. Once outside, two men approached me. They grabbed hold of my arms and a third man then handcuffed and blindfolded me.

26. Before being blindfolded, I saw a white minivan, and in front of it, a black jeep. I also saw many people in plain clothes waiting around. I was placed in the jeep and it drove off. By the manner in which it was being driven, I think that it was following another car.

27. After about half an hour, the vehicle came to a halt. I was taken out of the vehicle and made to sit down on a chair, where I sat for about another one and a half hours. At this point, I heard the voice of the assistant who had come to see me with the high-ranking official. I was told that I would soon be taken into a room for a medical examination before being returned to Germany.

28. As I was led into this room, I felt two people violently grab my arms, one from the right side and the other from the left. They bent both my arms backwards. This violent motion caused me a lot of

pain. I was beaten severely from all sides. I then felt someone else grab my head with both hands so I was unable to move. Others sliced my clothes off. I was left in my underwear. Even this they attempted to take off. I tried to resist at first, shouting out loudly for them to stop, but my efforts were in vain. The pain from the beatings was severe. I was terrified and utterly humiliated. My assailants continued to beat me, and finally they stripped me completely naked and threw me to the ground. My assailants pulled my arms back and I felt a boot in the small of my back. I then felt a stick or some other hard object being forced in my anus. I realized I was being sodomized. Of all the acts these men perpetrated against me, this was the most degrading and shameful. I was then pulled to my feet and pushed into the corner of a room. My feet were tied together, and then, for the first time since the hotel, they took off my blindfold. As soon as it was removed, a very bright flashlight went off and I was temporarily blinded. I believe from the sounds that they had taken photographs of me throughout.

29. When I regained my vision, I saw seven to eight men standing around me, all dressed in black, with hoods and black gloves.

30. I was dressed in a diaper, over which they fitted a dark blue sports suit with short sleeves and legs. I was once again blindfolded, my ears were plugged with cotton, and headphones were placed over my ears. A bag was placed over my head and a belt around my waist. My hands were chained to the belt. They put something hard over my nose. Because of the bag, breathing was getting harder and harder for me. I struggled for breath and began to panic. I pictured myself like the images I had seen in the media of the Muslims that were brought to Guantánamo.

31. They bent me over, forcing my head down, and then hurried with me to a waiting car and then on to a waiting aircraft. They walked so fast that the pain at my joints was getting worse, as the iron of my shackles chaffed against my ankles. When I tried to slow down they almost dislocated my shoulder. In the airplane, I was thrown down onto the floor and my arms and legs were spread-eagled and secured to the sides of the plane.

32. During the flight I received two injections, one in the left arm and one in the right arm, at different times. They put something over my nose. I think it was some kind of anesthesia. It felt like the trip took about four hours, but I don't really remember. However, it appeared to be a much longer trip than one to Germany.

33. I was mostly unconscious for the duration. I think the plane touched down once and took off again. When the plane landed for the final time I was fully conscious, although still a little light-headed. I was taken outside the aircraft. I could feel dry, warm air and knew immediately that the place where the plane had landed couldn't possibly be Europe.

34. I later learned that aviation documents show that a Boeing business jet owned and operated by some of the defendants in this case, then registered by the FAA as N313P, took off from Palma, Majorca, Spain on January 23, 2004, and landed at the Skopje airport at 8:51 p.m. that evening. The jet left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital. I believe I was on that plane. Attached hereto as Exhibit A are true and correct copies of the aircraft logs for January 23, 2004.

35. After being removed from the aircraft, I was thrown down into what felt like the trunk of a vehicle. The vehicle drove for about ten minutes. I was then

dragged out of the trunk and down a flight of stairs. My arms were raised high behind my back. I was marched so quickly that at times my feet hardly touched the ground. They pushed and shoved me against the walls of the building. Finally I was thrown to the ground. They beat me and kicked my head. Someone stepped on my head and neck with his feet, then removed my chains and my blindfold. I heard them leave and the door being pulled hard and locked behind them.

36. After adjusting my eyes to the light, I could see that I was lying in a small, filthy, concrete cell. The walls were covered in crude Arabic, Urdu, and Farsi writing. In place of a bed there was one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. It was cold and dark. Through a small opening near the roof of the cell I could see the red, setting sun. It was only then that I realized that I had been traveling for some 24 hours.

37. Through a small grille on the metal door of the cell I could see a man dressed in Afghan clothes standing in front of the cell. I was very thirsty at this point and called out to the man for some water. The man pointed to a small bottle in the corner of my cell. It was a very old plastic bottle, dirty outside as well as in. The color of the water was greenish-brown. It stank. I could smell the water from the other side of the cell. After I held the bottle, the smell stayed on my hands for quite some time. I was extremely thirsty but when I tried to drink the water, it caused me to vomit. It was impossible for me to drink from this bottle.

38. That night, four masked men in black uniforms came to my cell, dragged me outside, and pushed me into a room close by. The room was bare apart from a table and some chairs. Three men in masks were sitting in the room when we arrived. Two wore the

same uniform as my four escorts, the third was dressed in shirt and jeans.

39. Speaking in Arabic with a Palestinian accent, one of them instructed me to strip naked as a doctor was going to examine me. I undressed, but left on the diaper. I was instructed to remove this as well and complied. I was left standing naked.

40. I was then photographed, and blood and urine samples were taken by one of the masked men. I think he may have been a doctor.

41. The "doctor" wore a tight-fitting mask covering his head and extending down his neck. From his eyes, the grey hair that was visible, and the tone of his voice, he appeared to me to be around 40 or 50 years of age. He was dressed casually in jeans and a blue checked shirt. I complained to him about the unhygienic cell and the filthy water. He told me that the Afghans were responsible for the conditions of my confinement. He then asked whether I preferred Islamic or non-Islamic food. I told him I wanted Islamic food. Later I found out that he had made fun of me for this request since the Afghan food was nothing more than the leftovers of the Afghan guards. All it consisted of was chicken bones and skin.

42. After the examination, which lasted about ten minutes, I dressed and was accompanied back to my cell. I had to search for the bed because the cell was so dark. There was no lighting. I found it almost impossible to sleep because it was so cold and I was in so much pain from being strapped to the unpadded floor of the airplane. I could not sleep on my right or left sides. Only after ten days was I able to sleep on my front or back. My discomfort was made worse by the nighttime cold in Kabul at this time, and I only had one blanket.

43. On the second night, four masked men came to my cell, bound my hands and feet, and dragged me

into the interrogation room again. Seven other men were in the room. All of them were masked and wearing black matching uniforms. One of them yelled at me to come forward. He spoke Arabic with a South Lebanese accent. The man asked if I knew why I had been detained; I said that I did not. He then told me that I was in a land where there were no laws, and that nobody knew I was there.

44. On the desk in front of him was a file. He said that the file contained information about me and was the reason I had been detained in Skopje and flown to Afghanistan. He said that the file contained evidence that I had attended a terrorist training camp here in Afghanistan, that my passport was forged. He interrogated me about these issues and my alleged association with important terrorists like Muhammed Atta, Ramzi Bin Al-Shibh and other alleged extremists based in Germany.

45. I said that I had only heard of these individuals in the media, adding that if they wanted to determine whether I had ever trained in Afghanistan and whether my passport was a fake, all they had to do was speak with the German authorities who would prove that I was a German citizen and that I had never been to Afghanistan. I repeatedly asked him to contact the German government. I also asked why I had been taken to Afghanistan, when I was a German citizen, and had no ties to this country. My interrogator did not answer.

46. In total, I was interrogated on three or four occasions, each time by the same man, and each time at night. In one of these interrogations, I was asked about telephone calls to Sudan. My interrogations were always accompanied by threats, insults, pushing, and shoving. Two of the men who participated in these interrogations identified themselves as Americans. During each interrogation, I demanded

that I meet with a representative of the German government. My demands, however, were ignored.

47. In March, together with several other inmates with whom I had been communicating through the cell walls, I commenced a hunger strike. We refused to eat or drink and demanded to see an American commander or representative to complain and demand our basic human rights. Initially, there was no response to our demands. After six days, I became very weak and felt close to death. I started to drink again, but still refused to eat.

48. On the eighth day, one of the inmates met with an American official and handed him a note detailing some of our demands, including that our captors respect our most basic human rights, afford us access to a court to challenge our continued detention, inform our relatives of our whereabouts, and give us reading materials. None of our demands were met.

49. On March 13, I was interrogated by three unmasked American officials and a psychologist who also functioned as the prison's Arabic interpreter. This interpreter had a Syrian accent. The interrogation focused on my alleged associations with Dr. El-Attar, Dr. Yousif, his son Omar, and Mr. Reda Seyam. I was also asked about people associated with the multicultural center "Multi Kultur Haus" in Ulm and the Islamic Information Center (IIZ) in Ulm.

50. On March 31, after twenty-seven days without food, I noticed people standing outside of the house and I shouted to them. I was taken to an interrogation room. After my hands and feet were shackled, I met with two unmasked Americans. One described himself as the prison director; the other was a more senior official whom some of the other inmates referred to as "the Boss." In addition, the Afghan prison director and the Arabic translator with a Palestinian accent were both present.

51. I was asked why I was on hunger strike. I replied that I was protesting my abduction from Macedonia and my detention in Afghanistan. I said that I was also protesting against my continued detention without charge or trial, their refusal to allow me access to a lawyer or my family or government, and the inhumane conditions of my confinement.

52. The American prison director demanded that I end my hunger strike. I responded that I would not unless I was released, brought before a court, or permitted immediate access to a German government official. The only other circumstance that would bring my hunger strike to an end was death. The American prison director said that I was innocent of any crime, and that he would take that matter up with his superiors in Washington, D.C., but that he could not release me without their authorization. After this conversation I was taken back to my cell, and continued my hunger strike. My health continued to deteriorate on a daily basis. I received no medical treatment despite my repeated requests.

53. From media reports, I understand that shortly after I was abducted and transferred to detention in Afghanistan, senior personnel within the CIA as well as the State Department knew that they had the wrong man and that I was being detained unlawfully. Attached hereto as Exhibit B are true and correct copies of media reports substantiating this fact.

54. By April 8 I was so weak that I was unable to leave my bed, not even to use the toilet. On April 9 some Afghans came to see me and tried to convince me to end my hunger strike, as they had noticed how much my health had deteriorated. By April 10 I had been on hunger strike for exactly thirty-seven days.

55. On the night of April 10, thirty-seven days into my hunger strike, hooded men entered my cell, dragged me from my bed, and bound my hands and

feet. They dragged me into the interrogation room, sat me in a chair, and tied me to it. One of the men then grabbed my head. A tube was stuffed up my nose and some sort of liquid was forced directly into my stomach. After this procedure, I was given some canned food as well as some books to read. I noticed that the food boxes had blue and white labels, and listed sodium and potassium as part of their contents. I could also make out "USA" written on these boxes. I was also weighed at this time. The scale showed that since the time of my initial detention in December 2003, I had lost more than sixty pounds.

56. Around April 8, 2004, I distinctly recall feeling an earth tremor. After my return to Germany, my lawyers obtained records online from the Geological Survey. These records show that on February 14 and April 15, 2004, there were indeed two tremors recorded in the vicinity of Kabul. Attached hereto as Exhibit C is a true and correct copy of these records.

57. Thirty hours after this force-feeding, I became extremely ill and suffered excruciating pain in my stomach. A doctor visited me in my cell in the middle of the night and administered medication on which I could read the name "Cipro." I remained in bed thereafter for several days, during which time my health gradually improved.

58. Around the beginning of May, the Afghan prison director took me to the interrogation room where I met with an American who identified himself as a psychologist as well as a female interpreter. The psychologist told me he had come all the way from Washington, D.C. to check on me and ask me some questions. At the end of our conversation, he promised that I would be released from the facility very soon.

59. Some days later, on May 16, the American prison director, together with a man in military

uniform, arrived. The man in the military uniform spoke German and identified himself only as "Sam." "Sam" was about 180cm tall, slim, and had light brown hair. His skin was very tanned. He wore glasses and a cap. He told me that he wanted to talk honestly with me about everything I knew. I said that I was more than happy to share everything I knew with him, but before I did I wanted to know who from the German government had sent him. Before answering he turned to the two Americans beside him (one was the prison director) and spoke with them in English. I could not understand exactly what they were talking about, but after speaking with the director he told me in German that he could not respond to the specific questions I had raised. I then asked him if anyone in the German government knew I was here. Again he refused to respond. I then asked him if my wife knew where I was. To this, he replied no. I noticed that whenever he spoke he searched for his words. He seemed very nervous while the Americans stood beside him. After my questions, "Sam" began to interrogate me.

60. He asked more or less the same questions that I had previously been asked, in Macedonia and by the Americans as well, regarding my alleged associations with extremists in Neu-Ulm, Germany and people who attended or preached at the multicultural center in Neu-Ulm. In all, the conversation lasted for about two to three hours.

61. From our very first meeting I was convinced "Sam" was a German citizen and from his accent, from the North of the country. At one point he told me that his wife used a "Metro-Card," a particular card for the "Metro" supermarket that is generally used only by self-employed people, and it was clear to me from this conversation that he knew Germany intimately. Following my return home, I identified

"Sam" twice: once on January 1, 2006, from a photograph in the online newspaper "Saar-Echo" (after I was notified of the article by its author, Frank Kruger), and again on February 20, 2006 from a police line-up. His name is Gerhard Lehmann and he is an officer from the German BKA (Bundeskriminalamt). I am ninety percent certain that the "Sam" I met in Afghanistan and the man I identified in this line-up one and half years later are one and the same. Attached hereto as Exhibit D is a true and correct copy of a New York Times article reporting on my identification of "Sam."

62. "Sam" met with me three more times. On May 20, he told me that it might take them another week to assess whether or not I could be released. Upon hearing this I became angry and told him that they kept promising my release and always postponed it. I said that I would begin my hunger strike again the next day.

63. On May 21 I began my second hunger strike. In the evening that same day, the American prison director appeared together with "Sam" and an American doctor. "Sam" asked that I end my hunger strike and assured me that I would be on my way to Germany within the next eight days. He said that they were just clearing the security formalities for my transfer from Afghanistan to Germany. He explained that the flight would not go directly to Germany and that it would take many hours. He asked that I remain calm, not worry, and that I would be home soon.

64. I recall distinctly all of the dates mentioned in this declaration because I dutifully counted them from the first day of my detention. When I didn't have any paper or pencil to record the dates, I scratched the days off on the wall of my cell. Then, when I was issued paper and a pencil I wrote them down. When the other inmates warned me that the guards would

keep any papers in my cell when I left, I committed the dates to memory.

65. On the evening of May 27, the American doctor and the American prison director came to my cell. The doctor examined me. The director then said that I was to be flown back to Germany the next day. He went on to explain some of the details of the transfer from my cell to the airport. The doctor requested that I not eat or drink after that night, as I wasn't going to be permitted to use the bathroom during the flight.

66. The next morning, May 28, the doctor and the American prison director arrived in my cell. I was handcuffed, shackled, and blindfolded before being led outside and put inside a jeep. I was driven for about ten minutes and then taken inside a large empty shipping container. They sat me down in a chair so that I was unable to see out and was forced to face the wall. From this position, I could hear the sound of an approaching aircraft.

67. Shortly thereafter, my blindfold was removed and I was handed the suitcase that had been taken from me in Skopje. I was also given two t-shirts. I removed the clothes I had been wearing and changed into some of the clothes that I had in my suitcase and one of the t-shirts.

68. My hands were cuffed again. My ears were plugged and headphones were placed over my ears. I was blindfolded again and led back to the jeep. We drove a short distance to the waiting airplane. Once inside I was chained to the seat.

69. The plane was much smaller than the one that had flown me from Macedonia. It had leather seats. I wasn't administered any injections before taking off. "Sam" accompanied me. I could also hear American accents around me. Although they were muffled, it sounded to me like there were at least two or three

different people.

70. At one point during the flight, I asked if I could remove the headphones. "Sam" obliged and they remained off for the remainder of the flight.

71. After telling me that there was a new President in Germany, "Sam" explained that we would eventually land in a European country but that it would not be Germany itself. When he told me this, it heightened my persistent fear that I was not going to be flown home, but rather taken to another country and executed. The flight took about six to seven hours.

72. When the plane landed, "Sam" told me that we would part company there and some other people would make sure I got back to Germany safely. I was blindfolded and handcuffed the whole time. I was then bundled out of the plane and placed in the backseat of what I sensed to be a Japanese-made minivan-type vehicle. Specifically, I sensed that it was a Toyota F-model, by the sound it made when it drove over bumps. I had driven an identical model myself when I was back in Germany.

73. I was driven in the car, up and down mountains, on paved and unpaved roads for more than three hours. The vehicle came to a halt and I was aware of the three men in the car getting out, closing the doors and then three men climbing in to the vehicle. All of them had South European/Slavic accents, but said very little.

74. The vehicle proceeded to drive for another three hours, again up and down mountains and on paved and unpaved roads. Eventually, the vehicle was brought to a halt. I was taken out of the car and before my blindfold was removed, one of my captors turned me around. He then removed the blindfold, sliced the cuffs from my wrists, gave me my suitcase and passport, and directed me to walk down a path

without turning back.

75. I heard the car leave and began to walk as instructed. It was dark. No one was around. As I walked I feared that I was about to be shot in the back and left to die.

76. As I came round a corner in the road, I came across three armed men. They immediately asked for my passport. When they saw that my German passport had no Albanian visa, they said I was illegal and asked me what I was doing in Albania without the necessary authorization. I had no idea I was even in Albania. We walked together a short distance until we came upon an old one storey building. The building had an Albanian flag on it.

77. Some time later another man appeared. He seemed to be a superior officer. He went through my bags and asked me what I was doing in Albania. He said that from my appearance (I had grown long hair and a beard) I looked like a terrorist. When I told them the story of my arrest in Macedonia, transport to and imprisonment in Afghanistan, and eventual transport to Albania, they all laughed and said that no one would believe my story. The officer instructed me not to tell my story to anyone.

78. I asked if they could take me to the German Embassy. The officer in charge said that was unnecessary; they would take me to the airport and put me on a flight to Germany.

79. The whole time I was with them, I sensed that they had been expecting me; that our chance encounter on the road was not an accident at all but rather planned. One fact that seems to confirm this for me is that the bread, chips and cheese that I was given to eat during the road trip through Albania were in the same plastic bag that I got when I ate these very snacks at the border station, and they tasted exactly the same.

80. The three men drove me to the Mother Theresa Airport in Tirana. We arrived at around 6 a.m. One of the men took my passport and 320 Euros from my wallet and went in to the airport building. When he returned some fifteen minutes later, he instructed me to go through a door. On the other side, I was met by another man who accompanied me through customs and immigration controls and on to the airplane. Apart from an exit stamp in my passport, I went through these controls without further inspection. Only after the plane was airborne did I finally believe that I was going home.

81. Attached hereto as Exhibit E is a true and correct copy of relevant pages of my passport showing Macedonian entry and exit stamps as well as an exit stamp from Albania.

82. The plane landed at Frankfurt International Airport at 8.45 a.m. on May 29, 2004. I went through customs and immigration controls. By this time, I had lost a great deal of weight, something like sixty pounds, my hair was long and unkempt, and my beard had not been shaved since I arrived in Macedonia. Consequently, I looked nothing like the picture in my passport. The immigration officer questioned whether I was the same man, but after substantiating my identity with other documentation in my possession, he let me through.

83. From Frankfurt I traveled to Neu-Ulm and from there to my home village, Senden. I knew before I entered my house that no one was there and that no one had been there for some time. I went from my home to the Cultural Center in Neu-Ulm where I asked after my wife and children. I was told that my wife and children were all safe and well and that they had all relocated to her family's place in Lebanon. I called my wife and she returned to Germany with our four children one week later. On

July 31, 2005, our fifth child, Sirin was born.

84. On June 3, 2004, I met with my German lawyer Manfred Gnidjic. Initially skeptical of my account of what had happened to me, he asked that I write down a complete version of events and make drawings of the hotel in Macedonia where I had been detained for twenty-three days and the prison in Afghanistan. Attached hereto as Exhibit F are true and correct copies of my statement together with a plan of the hotel in Skopje and the prison in Afghanistan

85. Mr. Gnidjic also requested that I hand over all the items that I had with me in Macedonia and Afghanistan. Among other things, I gave Mr. Gnidjic my passport, which was stamped with entry and exit stamps for Macedonia and an exit stamp for Albania, my boarding pass for the flight from Tirana to Frankfurt, and the two t-shirts which had been given to me in Afghanistan.

86. On June 20, 2005, I met with Steven Watt of the American Civil Liberties Union (ACLU) in Ulm. I retained the ACLU to represent me in legal proceedings in the United States. On December 3, 2005, together with my German lawyer, Mr. Gnidjic, I attempted to travel to the United States to meet with my U.S. lawyers and to attend a press conference.

87. On December 3, 2005, we attempted to enter the United States in Atlanta. Although Mr. Gnidjic was permitted to enter the country, I was denied entry. No reasons were given for my refusal. I was sent back to Germany via France that same day. Attached hereto as Exhibit G is true and correct copy of the denial of entry.

88. On December 8, 2005, the ACLU wrote on my behalf to the U.S. Department of State and Department of Homeland Security seeking an explanation for my denial of entry to this country. Both the State Department and the Department of

Homeland Security responded that should I decide to enter the U.S. on some future occasion, they would facilitate the process. Attached hereto as exhibit H are true and correct copies of this correspondence.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April 2006.

s/Khaled El-Masri

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
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| Khaled El-Masri, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:05cv1417-TSE-TRJ |
| | ) | |
| George Tenet, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

DECLARATION OF MANFRED GNJIDIC IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Manfred Robert Gnjidic, of Ulm, Germany, under penalty of perjury under the laws of the United States of America, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a German citizen and a qualified attorney. I have my own practice, Gnjidic & Aehle, which is based in the city of Ulm. I have been practicing as an attorney in Germany since 1993.

2. Towards the end of May 2004, Mr. Khaled El-Masri made an appointment to meet with me at my office. We agreed that we would meet on June 3, 2004. During our meeting Mr. El-Masri recounted to me the story of what had happened to him in

Macedonia and Afghanistan. The story he narrated during that meeting is by and large identical to the one given by him in his declaration filed herewith.

3. After our first meeting I asked Mr. El-Masri to write down the full version of his story and to provide me with drawings of the hotel room and the prison where he was held in Afghanistan. I also asked that he provide me with all the physical evidence that he had that might substantiate his story. I took some pictures of him at this time. Attached hereto as Exhibit A are true and correct copies of the pictures I took at this time.

4. Mr. El-Masri provided me with his passport, his boarding pass for his flight from Tirana to Frankfurt, two t-shirts that he had been given in Afghanistan, and a number of keys that he had with him for the duration of his detention.

5. Following our meeting, on June 8, 2004, I wrote a letter on behalf of Mr. El-Masri to the German Chancellor and the German Minister for Foreign Affairs.

6. On June 15, 2004, Mr. Bernhardt from the public prosecution office in Memmingen, Germany, contacted me in regards to Mr. El-Masri's case and the allegations I had made on his behalf in my letters of June 8, 2004. Mr. Bernhardt explained that his office had opened an investigation into Mr. El-Masri's allegations and that he would need to interview him.

7. The public prosecution offices are established under the German Judicature Act (Gerichtverfassungsgesetz). Under the German Criminal Procedure Code (Strafprozessordung), the public prosecution office must investigate any suspected criminal offense and thereafter, depending on the findings of that investigation, file criminal proceedings with the court. Under German law, the

public prosecution office is required to ascertain not only incriminating but also exonerating evidence, and is obligated to safeguard and protect all available evidence as well as the source of such evidence. The public prosecution office may request information from any public authority and may conduct any type of investigation that it considers necessary, whether in Germany or overseas. The office conducts its investigation through its own officers, and other agents of the State, including police officers.

8. Officials from the public prosecution office conducted interviews with Mr. El-Masri on June 17 and 18, 2004, December 12 and 20, 2005, and February 20 and 27, 2006.

9. On June 23, 2004, Mr. El-Masri told me that he had been contacted by one of the prisoners with whom he had been incarcerated while in Afghanistan. I contacted one of the police officers who was working with the prosecutor on Mr. El-Masri's case to notify him of this potential witness. For the next several months we discussed the possibility of bringing this witness to Germany for an interview. Unfortunately, the prosecutor did nothing concrete to facilitate the witness' transportation to Germany. Neither Mr. El-Masri nor I have heard anything from him since September 2004.

10. On July 8, 2004, the prosecution file was transferred from the Memmingen office to the office in Munich I.

11. From July, 2004 to date, Mr. Martin Hoffman and Mr. August Stern from the Munich I public prosecution office have been investigating Mr. El-Masri's allegations. Officials from the office conducted a number of interviews with passengers on the bus on which Mr. El-Masri traveled from Ulm to the Serbian/Macedonian border. These interviews essentially confirm Mr. El-Masri's version of what

happened to him at the Serbian/Macedonian border.

12. I provided the prosecutor's office with Mr. El-Masri's passport, the two t-shirts he had been given in Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr. El-Masri had with him while in Macedonia and Afghanistan. The office requested these so that it could conduct forensic examinations on them, including fingerprint and DNA analysis. All these items remain with the prosecutor's office.

13. In addition, the prosecutor's office requested that Mr. El-Masri provide them with a hair sample to allow them to commission a radioactive isotope analysis of the follicles. The test results obtained are consistent with Mr. El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period. Attached hereto as Exhibit B is a true and correct copy of the analysis, together with an English translation.

14. On December 15, 2005, I gave the prosecutor's office a copy of a list of names that a Spanish investigative reporter working for the El Pais newspaper had given me. The reporter contended that the list contained the names of the individuals who had been on board the aircraft which had been used to transport Mr. El-Masri from Macedonia to Afghanistan and who were directly implicated in his rendition. The reporter said that he had compiled the list from a criminal investigation that had been conducted by a Spanish Prosecutor into the alleged use of the Palma, Majorca airport by aircraft used in renditions by U.S. corporations and personnel, including Mr. El-Masri's.

15. Sometime late in 2005 or early in 2006, the prosecution file became the joint responsibility of Mr. Hofmann, Mr. August Stern and a third prosecutor, all of whom are chief prosecutors (Oberstaatsanwalt)

with the Munich I public prosecution office. The file is still open and the investigation ongoing. Mr. Stern has indicated that he would be willing to consider providing this court with any of the evidence he has collected to date should this court deem it necessary.

16. On March 10, 2006 the opposition parties in the German Parliament agreed on an inquiry into, inter alia, Mr. El-Masri's alleged abduction and detention in Macedonia and Afghanistan. The mandate of the parliamentary committee will be to investigate CIA activities in Germany (including the alleged abduction and detention of El-Masri) and the alleged assistance given by German intelligence agencies to U.S. forces in Iraq. The inquiry began on March 31, 2006 and will meet in public session. A full report of the findings will be issued following its conclusion. Attached hereto as Exhibit D is a true and correct copy of the mandate of the German parliamentary inquiry.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April 2006.

s/Manfred Gnjidic

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| Khaled El-Masri, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No. |
| v. | ) | 1:05cv1417-TSE-TRJ |
| | ) | |
| George Tenet, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

DECLARATION OF STEVEN MACPHERSON WATT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I, Steven Macpherson Watt, under penalty of perjury, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a human rights adviser to the American Civil Liberties Union. I submit this declaration in support of Plaintiff Khaled El-Masri's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment.

2. Specifically, I submit this declaration to demonstrate the significant number of documents in the public domain regarding the Central Intelligence Agency's rendition program, and Mr. El-Masri's rendition in particular. These documents comprise,

*inter alia*, official unclassified U.S. government documents detailing the program, public statements by U.S. government officials describing in detail the parameters of the program, and documentation from international inter-governmental and national parliamentary inquiries and criminal investigations into European states' involvement in the U.S. rendition program. In addition, since Mr. El-Masri went public with his allegations, more than 300 articles in major newspapers have described his case, as have numerous U.S. and international television documentary programs. The documentation referenced in this declaration represents just a fraction of an extensive and growing number of documents describing the U.S. rendition program that are currently publicly available.

3. Since September 11, 2001, senior officials within the U.S. government, including senior intelligence officials, have spoken publicly about the rendition program.

4. On departing for Germany on an official state visit the day before this action was commenced, Secretary of State Condoleezza Rice defended the rendition program as "a vital tool in combating transnational terrorism." She explained that the United States "must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law." She continued: "For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." The U.S., she said, did not "have the luxury of only using law enforcement techniques," but required other options when it was unable to

"prosecute someone that is a known terrorist or a suspected terrorist...." She added:

> In some situations, a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make a sovereign choice to cooperate in a rendition.

Secretary Rice denied that individuals were rendered to permit coercive interrogation techniques: "The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured." Secretary Rice explained that persons detained by the United States may "be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful." She confirmed that foreign governments play a role in the process: "Some governments choose to cooperate with the United States in its intelligence, law enforcement, or military matters," and in return for their cooperation, the United States shares intelligence it gathers. Attached hereto as Exhibit A is a true and correct copy of Secretary of State Condolcezza Rice's *Remarks Upon Her Departure for Europe,* Andrews Air Force Base, (Dec. 5, 2005) transcript *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

5. In a press briefing the following day, Secretary Rice and German Chancellor Merkel fielded questions on renditions in general and on Mr. El-

Masri's alleged rendition in particular. In relation to El-Masri's case, Secretary Rice stated:

> When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary in American courts as well.

Attached hereto as Exhibit B is a true and correct copy of the *Joint Press Briefing by Condoleezza Rice and Angela Merkel*, (Dec. 6, 2005) transcript *available at* http://www.state.gov/secretary/rm/2005/57672.htm.

6. Chancellor Merkel later confirmed that she and Secretary Rice had spoken specifically about Mr. El-Masri's case, and related that "the American Government, the American Administration, has admitted that this man had been erroneously taken and that as such the American Administration is not denying that it has taken place." *Id.*

7. On the same day, in Washington D.C., White House Press Secretary Scott McClellan, citing Secretary Rice's comments, reiterated that the United States has long engaged in renditions of terror suspects, and denied that those suspects were tortured. Attached hereto as Exhibit C is a true and correct copy of the *Press Briefing by Scott McClellan*, (Dec. 6, 2005) transcript *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051206-3.html.

8. During a public meeting in Australia, Secretary Rice confirmed that "the practice of rendition is

something that's been practiced way before September 11th when extradition isn't an option because sometimes you have to take people off the streets." Attached hereto as Exhibit D is a true and correct copy of Secretary of State Condoleezza Rice's *Remarks at Town Hall Meeting with University of Sydney Students,* (March 16, 2006) transcript *available at* http://www.noticias.info/asp/aspComunicados.asp?nid=156045&src=0.

9. During the 9/11 Commission of Inquiry, intelligence officials, including defendant Tenet, gave both written and oral testimony on the program. Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the U.S. State Department's Bureau of Intelligence and Research, described the CIA's role in liaising with foreign government intelligence agencies to effect renditions, stating that the Agency "plays an active role, sometimes calling upon the support of other [government] agencies for logistical or transportation assistance" but remaining the "main player" in the process. Attached hereto as Exhibit E is a true and correct copy of *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States,* (March 24, 2004) (statement by Christopher Kojm, Deputy Executive Director, National Commission on Terrorist Attacks Upon the United States, and former Deputy Assistant Secretary of State), transcript *available at* http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf.

10. In a written statement submitted to the 9/11 Joint Inquiry Committee, defendant Tenet described

the CIA's role in pre-September 11 renditions. He explained that:

> During the Millennium threat period . . . [o]ver a period of months, there was close, daily consultation that included Director Freeh, the National Security Adviser, and the Attorney General. We identified 36 additional terrorist agents at the time around the world. We pursued operations against them in 50 countries. Our disruption activities succeeded against 21 of these individuals, and included arrests, renditions, detentions, surveillance, and direct approaches.

The CIA, he explained, worked "with numerous European governments, such as the Italians, Germans, French, and British," and "[by] 11 September, the CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world." Attached hereto as Exhibit F is a true and correct copy of *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee,* (October 17, 2002) *available at* http://www.cia.gov/cia/public_affairs/speeches/2002/dci_testimony_10172002.html.

11. In the written statement he submitted to the 9/11 Commission of Inquiry, defendant Tenet elaborated upon a number of specific instances of CIA involvement in renditions, including assisting "another foreign partner in the rendition of a senior Bin Laden associate" and assisting the Jordanian government in "render[ing] to justice" "terrorist cells that planned to attack religious sites and tourist hotels." Attached hereto as Exhibit G is a true and correct copy of *Written Statement for the Record of the Director of Central Intelligence Before the*

*National Commission on Terrorist Attacks Upon the United States,* (March 24, 2004) *available at* http://www.9-11commission.gov/hearings/hearing8/tenet_statement.pdf.

12. Based upon the testimony taken and written statements received, the 9/11 Commission staff developed initial findings that they later made available to the public. Under the heading "Rendition," these findings reveal that officials of the CIA, FBI, State Department, and foreign governments cooperated in the rendition of suspected terrorists. Specifically, they conclude that "the CIA helps to catch and send [the suspect] to the United States or a third country," and that renditions were "an important component of U.S. counterterrorism policy throughout the period leading up to 9/11" and "are still widely used today." Attached hereto as Exhibit H is a true and correct copy of *Staff Statement No. 7, National Commission on Terrorist Attacks Upon the United States, available at* http://www.9-11commission.gov/staff_statements/staff_statement_7.pdf.

13. Current CIA Director Porter Goss has testified about the rendition program in an open session of the Senate Armed Services Committee. In response to Senator Kennedy's questions about the existence of the rendition program and the transfer of terrorist suspects by the CIA, Director Goss stated:

> [O]n the subject of transferring dangerous terrorists and how that all comes about, there are obviously a number of equities involved. We have liaison sources, we have our other government agencies. The idea of moving people around, transferring people for criminal or other reasons, by

> government agencies is not new. For us in the intelligence business, the idea of helping out dealing with terrorists has been around for about 20 years. And we do have policies and programs on how to do it. We also have liaison partners who make requests of us, and we try to respect not only the sovereign rights of other countries, but all of the conventions and our own laws and, of course, the Constitution. And as far as I know, we do that.

Attached hereto as Exhibit I is a true and correct copy of *Threats to U.S. National Security: Hearing of the Senate Armed Services Committee*, 109th Cong. 4, (March 17, 2005) (Responses to Senators McCain and Kennedy), transcript *available at* http://www.humanrightsfirst.org/us_law/etn/docs/fedwires125g.htm.

14. Former senior CIA operatives have spoken openly and in detail about the rendition program. Michael Scheuer, a 22-year veteran of the CIA and Chief of the Bin Laden Unit at the Counterterrorist Center from 1996 to 1999, was an architect of the rendition program. Scheuer has described the program's origins and its current manifestation: "The direction [from the politicians] was find, apprehend and hold senior members of Al Qaeda and try to find out what they know about coming attacks against the United States." He said also that, presently, "the U.S. government is willing to hold these people at various incarceration sites around the world." Attached hereto as Exhibit J are true and correct copies of *Interview of Michael Scheuer*, PBS Frontline, (Oct. 18, 2005) *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/scheuer.html, and Michael Scheuer, *A Fine*

*Rendition*, NEW YORK TIMES, (March 11, 2005), at A23, (explaining that "[r]enditions were called for, authorized and legally vetted not just by the N.S.C. and the Justice Department, but also by the presidents – both Mr. Clinton and George W. Bush," and "if mistakes were made, like the alleged cases of innocent detainees, they should be corrected . . . .").

15. Robert Baer, a former covert officer for the CIA who left the agency after 21 years, has confirmed that one goal of the rendition program is to employ harsher interrogation tactics: "If you send a prisoner to Jordan you get a better interrogation. If you send a prisoner, for instance, to Egypt you will probably never see him again, the same way with Syria." Attached hereto as Exhibit K is a true and correct copy of *Transcript of "File on Four" – Rendition,* BBC, (Feb. 8, 2005) *available at* http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf.

16. Members of Congress have publicly debated the parameters of the rendition program and proposed concrete legislative measures for its reform. In response to a letter from Senator Leahy expressing concerns about rendition and its failure to comport with U.S. obligations under the Convention Against Torture, William J. Haynes II, General Counsel of the Department of Defense wrote: "Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country." Attached hereto as Exhibit L is a true and correct copy of the *Letter from William J. Haynes II to Senator Patrick Leahy*, (June 25, 2003) *available at* http://hrw.org/press/2003/06/letter-to-leahy.pdf.

17. Senator Leahy has introduced legislation to address the rendition of any individual by the United States to another country. Attached hereto as Exhibit M is a true and correct copy of *Convention Against Torture Implementation Act 2005* (S. 654), 109th Congress, (2005) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s654is.txt.pdf. Representative Markey has introduced similar legislation in the House. Attached hereto as Exhibit N is a true and correct copy of *Torture Outsourcing Prevention Act* (H.R. 952), 109th Congress, (February 17, 2005) *available at* http://www.theorator.com/bills109/hr952.html. In introducing the bill, Representative Markey stated: "Under the name 'extraordinary rendition,' the CIA reportedly sends terrorism suspects, sometimes on the flimsiest of evidence, to foreign countries that are known to employ torture in prisoner interrogation...." Attached hereto as Exhibit O is a true and correct copy of Representative Edward Markey's Comments, *Introduction of Legislation Prohibiting Extraordinary Rendition*, House of Representatives, (June 23, 2004) *available at* www.fas.org/irp/congress/2004_cr/rendition.html.

18. The interest of members of Congress in the rendition program has also prompted a report from the Congressional Research Services that comprehensively details the history of the program, its current parameters, and the legal constraints on its use under domestic and international law. Attached hereto as Exhibit P is a true and correct copy of Congressional Research Services Report for Congress, R*enditions and Constraints Imposed by Laws on Torture*, (September 22, 2005) *available at* http://www.fas.org/sgp/crs/natsec/RL32890.pdf.

19. International Human Rights organizations in numerous reports have documented the existence of the program and cited in detail to many examples of its use around the world. Attached hereto as Exhibits Q are true and correct copies of Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture,* (April 2004) *available at* http://www.hrw.org/reports/2004/un0404/ (documenting specific rendition cases and discussing use and efficacy of "diplomatic assurances" in the process); Amnesty International, USA/Yemen, *Secret Detention in CIA "Black Sites,"* (November 8, 2005) *available at* http://web.amnesty.org/library/pdf/AMR511772005ENGLISH/$File/AMR5117705.pdf (documenting U.S. and Yemeni governments involvement in renditions); Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture By Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* (2004) *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf (documenting U.S. involvement in numerous renditions, including Mr. El-Masri's, and setting forth applicable legal framework); and Amnesty International, USA, *Below the Radar: Secret Flights to Torture and Disappearance,* (April 5, 2006) *available at* http://web.amnesty.org/library/Index/ENGAMR510512006 (describing use of privately owned aircraft in U.S. rendition program and specifically in Mr. El-Masri's case; documenting recent interview between Amnesty International researcher in Yemen and Walid al-Qadasi, a Yemeni national detained in Kabul by U.S. authorities in 2002, then at Guantánamo Bay, before being transferred to custody in Yemen, who identified Mr. El-Masri's sketch plan of the prison

facility [Exh. F to Declaration of Khaled El-Masri] as the same facility in which he was held by U.S. authorities in 2002).

20. Concern among European nations about complicity in the rendition program through the operation of U.S.-run detention centers in certain European countries and the use of European airspace and airports by the CIA to facilitate the program has resulted in inter-governmental inquiries by the Council of Europe and European Parliament, as well as separate criminal investigations and public inquiries in 18 countries, including, *inter alia,* France, Italy, Spain, Sweden, United Kingdom, and Germany. Attached hereto as Exhibits R are true and correct copies of the following documents:

i) Council of Europe's Parliamentary Assembly Committee on Legal Affairs and Human Rights (Rapporteur Dick Marty), *Report On Alleged Secret Detentions In Council Of Europe Member States,* (January 22, 2006) *available at* http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf

ii) European Parliament, TDIP Temporary Committee, *Working Document of Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,* (February 14, 2006) *available at* http://www.europarl.eu.int/meetdocs/2004_2009/documents/dt/580/580259/580259en.pdf;

iii) Craig Whitlock, *Europeans Probe Secret CIA Flights: Questions Surround Possible Illegal Transfer of Terrorism*

*Suspects*, WASHINGTON POST, (November 17, 2005), at A22, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602198.html (reporting that officials in Spain, Sweden, Norway and European Parliament had opened formal inquiries or demanded answers from U.S. officials about CIA rendition flights within their respective jurisdictions);

iv) Eric Decouty, *La France Enquete Sur Les Avions de la CIA*, LE FIGARO (France), (March 2, 2006) *available at* http://www.lefigaro.fr/france/20060302.FIG000000200_la_france_enquete_sur_les_avions_de_la_cia.html (reporting that Attorney General for Bobigny had opened criminal investigation into use of Bobingy airport by CIA for rendition flights);

v) Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan: Italy Allegedly Misled on Cleric's Abduction*, WASHINGTON POST, (Dec. 6, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400885.html (reporting that prosecutors and judges in Milan have issued arrest warrants charging 22 alleged CIA operatives, including head of CIA Milan substation, with kidnapping and other crimes);

vi) Giles Tremlett, *Spanish Police Expose More CIA Links To Secret Flights Of Detainees*, THE GUARDIAN, (Nov. 15, 2005), at 18, *available at*

http://www.guardian.co.uk/spain/article/0,,1642828,00.html (reporting that Spanish police have traced up to 42 suspected CIA operatives believed to have taken part in secret flights carrying detained or kidnapped Islamic terror suspects to interrogation centers and jails in Afghanistan, Egypt, and elsewhere);

vii) Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' Of Terror Suspects Illegal*, WASHINGTON POST, (May 21, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052001605_pf.html (reporting on ten-month investigation into rendition of two Egyptian asylum seekers);

viii) Office Of The Swedish Parliamentary Ombudsman, *A Review Of The Enforcement By The Security Police Of A Government Decision To Expel Two Egyptian Citizens*, (March 22, 2005), *available at* http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662 (finding that Swedish security police cooperated with U.S. agents in rendition of two Egyptian asylum seekers to Egypt, where there was strong likelihood of torture);

ix) Richard Norton-Taylor and Ian Cobain, *MPs recall Straw as air traffic controllers confirm 200 CIA flights*, THE GUARDIAN, (February 23, 2006), at 5, *available at*

http://www.guardian.co.uk/usa/story/0,,1715866,00.html (reporting on initiation of U.K. Parliamentary Inquiry into rendition flights);

x) *German spy probe to include CIA "kidnap," flights,* REUTERS, (March 10, 2006) *available at* http://today.reuters.com/news/newsArticle.aspx?type=worldNews&storyID=2006-03-10T150911Z_01_L10531306_RTRUKOC_0_US-GERMANY-USA-SPIES.xml&archived=False (reporting on commencement of German parliamentary inquiry into alleged kidnapping of Khaled El-Masri by CIA).

21. The United Nations has also examined the U.S. rendition program and is conducting further investigations into its implementation. The U.N. Committee Against Torture (CAT) has considered two cases relating to the rendition of two Egyptian asylum seekers from Sweden to Egypt on December 18, 2001. In the course of its deliberations, the CAT considered evidence of CIA involvement produced by the parties. In one of the cases, the CAT found Sweden in violation of article 3 (prohibition against rendition to torture) of the U.N. Convention Against Torture. Attached hereto as Exhibit S is a true and correct copy of the Decision of the CAT in *Agiza v. Sweden*, CAT/C/34/D/233/2003, (May 20, 2005) *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4dec90a558d30573c1257020005225b9?Opendocument.

22. In addition, on August 30, 2005, the U.N. Special Rapporteur on Torture submitted a report to the U.N. General Assembly that includes an analysis of specific rendition cases and U.S. involvement therein. The report concludes that the renditions

violated key provisions of the Convention Against Torture. Attached hereto as Exhibit T is a true and correct copy of the *Report of the U.N Special Rapporteur on Torture to the U.N. General Assembly*, (August 30, 2005) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/476/51/PDF/N0547651.pdf?OpenElement.

23. A Commission of Inquiry has been convened in Canada following the rendition of a Canadian citizen, Maher Arar, by U.S. officials to detention and interrogation in Syria. Public hearings commenced in May 2005. The Inquiry has resulted in the production of numerous official documents linking the decision to remove Mr. Arar to Syria to the United States. Attached hereto as Exhibit U is a true and correct copy of *Terms of Reference for the Public Inquiry into the Maher Arar Matter*, (February 5, 2004) *available at* http://www.ararcommission.ca/eng/Terms_of_Reference.pdf.

24. In August 2005, a legal memorandum drafted by the FBI analyzing interrogation techniques in place at Guantánamo became publicly available. The memorandum includes a legal analysis of rendition as one of four interrogation techniques employed on detainees at Guantánamo, and notes that one of the techniques contemplates the transfer of detainees from Guantánamo, "either temporarily or permanently, to Jordan, Egypt or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information." Attached hereto as Exhibit V are true and correct copies of Federal Bureau of Investigation, *Memorandum on Legal Analysis of Interrogation Techniques,* (November 27, 2002), and Michael Isikoff, *Exclusive: Secret Memo –*

*Send to Be Tortured*, NEWSWEEK, (August 8, 2005), at 7, *available at* http://msnbc.msn.com/id/8769416/site/newsweek/?rf=technorati (quoting unnamed senior U.S. law-enforcement official familiar who stated that "the memo reflects concerns among many agents and lawyers about 'rendition.'").

25. According to media reports, the Inspector General of the CIA is conducting an investigation of the rendition program and specific instances of mistakes that have been made in relation to its implementation. Attached hereto as Exhibit W is a true and correct copy of *CIA Watchdog Looks into 'Erroneous Renditions': Inspector general investigates cases of people mistaken as terror suspects*, ASSOCIATED PRESS, (December 27, 2005) *available at* http://www.msnbc.msn.com/id/10618427/ (citing current intelligence official and reporting that CIA's inspector general is investigating fewer than 10 cases of potentially "erroneous renditions").

26. Media reports on the rendition program generally, and Mr. El-Masri's rendition specifically, are too numerous to assemble. A Westlaw search confined to "El-Masri and rendition" in the period January, 2005 to April, 2006, revealed 297 news articles in that database alone. These articles have appeared on the front pages of the Washington Post, New York Times, and Los Angeles Times, and have been prominently featured in The New Yorker, Newsweek, and other major publications around the world. Mr. El-Masri's case has been featured on CBS' 60 Minutes, PBS Frontline, Dateline NBC, and ABC news. Attached hereto as Exhibits X are true and correct copies of the following newspaper articles and television documentary transcripts:

i) Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Prisons*, WASHINGTON POST, (December 26, 2002), at A1, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A37943-2002Dec25?language=printer (interviewing U.S. officials involved in renditions and quoting one official as saying: "We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.");

ii) Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, NEW YORK TIMES, (January 9, 2005), at 11, *available at* http://www.nytimes.com/2005/01/09/international/europe/09kidnap.html?ex=1263013200&en=f9446887460b5463&ei=5088&partner=rssnyt (first comprehensive account of Mr. El-Masri's story in U.S., describing his rendition and alleged involvement of CIA);

iii) Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, (February 14 and 21, 2005) *available at* http://www.newyorker.com/printables/fact/050214fa_fact6 (providing comprehensive accounting of rendition program from its initial inception to present);

iv) Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, NEWSWEEK,

(February 28, 2005) *available at* http://www.msnbc.msn.com/id/6999272/site/newsweek/ (describing Mr. El-Masri's rendition and CIA's broader rendition program);

v) Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, NEW YORK TIMES, (March 6, 2005), at 11, *available at* http://www.nytimes.com/2005/03/06/politics/06intel.html?ex=1267851600&en=716eddf5c82d9367&ei=5088&partner=rssnyt (explaining that current rendition program was authorized by President George W. Bush six days after September 11, 2001);

vi) *CIA Flying Suspects to Torture?*, 60 MINUTES (CBS television broadcast), (March 6, 2005) transcript *available at* http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml) (discussing rendition program and Mr. El-Masri's case, and describing U.S. modus operandi: "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away.");

vii) Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST, (November 2, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (describing establishment of network of CIA-run "black site" detention facilities worldwide; explaining that prisoners held within covert system were divided into two tiers: (1) major terrorism

suspects, held at black sites; and (2) prisoners with limited intelligence value, who are transferred to custody of foreign governments);

viii) Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA mistake*, WASHINGTON POST, (December 4, 2005), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html (describing in detail the decision-making process during Mr. El-Masri's rendition, including internal CIA discussions and role of German and Macedonian governments).

27. Much information about the role of private airline corporations in the rendition program has been uncovered by investigative journalists. Information is now widely available online identifying the role of particular corporations and aircraft in the renditions of specific individuals, including Mr. El-Masri. Attached hereto as Exhibits Y are true and correct copies of the following documents:

i) Photographs of N4476S (formerly N313P), *available at* http://www.airliners.net/search/photo.search?cnsearch=33010/1037&distinct_entry=true;

ii) Federal Aviation Administration Registry for N4476S (formerly N313P), *available at* http://registry.faa.gov/aircraftinquiry/NNumSQL.asp?NNumbertxt=4476S&status=is+not+Assigned%2FReserved;

iii) Massachusetts State Registration Certificate for Premier Executive Transportation Services Registration

Certificate 521857292, *available at* http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=521857292;

iv) *The Broken Promise, Part I,* Kalla Fakta (television broadcast on Sweden's TV 4), (May 17, 2004) English transcript *available at* http://www.hrw.org/english/docs/2004/05/17/sweden8620.htm (discussing role played by aircraft with FAA registration number N379P and owned by defendant Premier Executive Transportation in rendition of two Egyptian asylum seekers from Sweden to Egypt in December, 2001);

v) Scott Shane, Stephen Grey, and Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, NEW YORK TIMES, (May 31, 2005), at A1, *available at* http://www.nytimes.com/2005/05/31/national/31planes.html?ei=5088&en=6007accb4801296c&ex=1275192000&adxnnl=1&partner=rssnyt&emc=rss&adxnnlx=1144156272-pU9RpnnBz4dTPcBFDgvzIw (discussing defendant Aero Contractors Limited's role in rendition program, and specifically Mr. El-Masri's rendition);

vi) A.C. Thompson and Trevor Paglen, *The CIA's Torture Taxi*, SAN FRANCISCO BAY GUARDIAN, (December 14-20, 2005), Vol. 40, No. 11, *available at* http://www.sfbg.com/40/11/cover_plane.html (describing institutional structure of defendant Keeler and Tate Management,

including its ownership of aircraft registered N4476S, based upon examination of publicly available company registration documents and annual returns);

*vii)* Dana Priest, *Jet Is an Open Secret in Terror War*, WASHINGTON POST, (Dec. 27, 2004), at A1, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A27826-2004Dec26?language=printer (discussing generally use of CIA "front companies" in rendition program);

viii) *Op. Cit.* Exh. Q, Amnesty International, *Below the Radar: Secret Flights to Torture and Disappearance*, (April 5, 2006) (describing rendition program and its support network of aircraft and airports and documenting over 1,000 flights linked to renditions based on several sources including, *inter alia*, FAA flight records; European flight records; actual flight logs; aircraft movements recorded by airport authorities and airport records acquired in police and parliamentary investigations).

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of April 2006.

s/Steven Macpherson Watt

9/5/2007

(6)

No. 06-1613

# In the Supreme Court of the United States

KHALED EL-MASRI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the unavailability of information protected by the state secrets privilege requires dismissal of petitioner's suit.

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# In the Supreme Court of the United States

No. 06-1613

KHALED EL-MASRI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-51a) is reported at 479 F.3d 296. The opinion of the district court (Pet. App. 1a-20a) is reported at 437 F. Supp. 2d 530.

### JURISDICTION

The judgment of the court of appeals was entered on March 2, 2007. The petition for a writ of certiorari was filed on May 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner alleges that he was detained by local law enforcement officials while traveling in Macedonia, that Macedonian officials handed him over to Central Intelligence Agency (CIA) officials, and that CIA offi-

cials transported him to Afghanistan, where Afghan and CIA officials allegedly detained and interrogated him before releasing him in Albania. Pet. App. 3a-4a, 23a. Petitioner further asserts that his alleged transport, confinement, and interrogation were parts of a broader policy that involved "the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws." *Id.* at 23a (quoting complaint).

Based on those allegations, petitioner brought this damages action against former Director of Central Intelligence George J. Tenet in his individual capacity, three corporations, and various unnamed (John Doe) defendants, asserting that they had violated his rights under the Constitution and international law. Pet. App. 5a-7a, 21a-22a. Petitioner alleged that Tenet knew of and approved both the alleged policy and the specific actions alleged in the complaint, and that the unnamed Doe defendants carried out those actions. *Id.* at 5a-6a, 23a-24a. Petitioner also alleged that the defendant corporations provided an aircraft and crew to transport him to Afghanistan. *Id.* at 23a-24a.

Before the defendants filed answers or motions to dismiss, the United States filed a Statement of Interest asserting the state secrets privilege and seeking a stay of all proceedings. See Pet. App. 24a-25a. Then-CIA Director Porter Goss asserted the privilege in a public declaration and further explained the basis for the privilege in a classified declaration that was submitted to the district court ex parte and in camera. *Id.* at 52a-58a. The public declaration explained that because of the need to "protect classified intelligence sources and

methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs," the United States "can neither confirm nor deny" petitioner's allegations. *Id.* at 54a-55a. The United States subsequently intervened and moved to dismiss the complaint on the ground that the case could not be litigated without information protected by the state secrets privilege. *Id.* at 25a.

2. The district court dismissed the case. Pet. App. 1a-20a. It determined that "there is no doubt that the state secrets privilege is validly asserted here" because the Director of the CIA personally invoked the privilege and provided "firm support" for doing so in his classified, in camera declaration. *Id.* at 11a-12a. On the public record, the court explained that petitioner's complaint "alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program," and the CIA Director's public declaration "makes pellucidly clear" that "any admission or denial of [petitioner's] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security." *Id.* at 12a.

The district court rejected petitioner's argument that the state secrets privilege had been undermined by media coverage and public statements by government officials. Pet. App. 12a-14a. In doing so, the court emphasized "the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case." *Id.* at 12a. Likewise, the court considered it "self-evident" that neither petitioner's complaint nor media reports,

"often relying largely on [petitioner's] allegations," could undercut the state secrets privilege because such speculative allegations "are entirely different from the official admission or denial of those allegations." *Id.* at 13a.

Having upheld the government's invocation of the state secrets privilege, the district court turned to the question whether petitioner's claims "could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege." Pet. App. 15a. "In the instant case," the court concluded, "this question is easily answered in the negative." *Ibid.* The court explained that "any answer to the complaint by the defendants * * * would reveal considerable detail about the CIA's highly classified overseas programs and operations." *Id.* at 15a-16a. Thus, the court concluded, "well-established and controlling legal principles require that in the present circumstances, [petitioner's] private interests must give way to the national interest in preserving state secrets." *Id.* at 17a.

3. The court of appeals unanimously affirmed. Pet. App. 21a-51a. The court explained that the state secrets doctrine permits the United States to "prevent the disclosure of information in a judicial proceeding if 'there is a reasonable danger' that such disclosure 'will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 28a (quoting *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)).

The court of appeals explained that, when the government invokes the state secrets privilege, a court should undertake a multilayered inquiry. Pet. App. 31a. First, the court must determine whether "the procedural requirements * * * have been satisfied." *Ibid.* Second, it must "decide whether the information sought

to be protected qualifies as privileged," which turns on whether "there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged." *Id.* at 31a, 39a. Finally, the court must determine "how the matter should proceed," which will "vary from case to case." *Id.* at 31a, 35a. As relevant here, the court explained that a "proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." *Id.* at 39a.

The court of appeals explained that petitioner "essentially accept[ed] the legal framework described above." Pet. App. 39a. In addition, the court noted, petitioner neither disputed that the CIA Director's declaration satisfied the formal, procedural requirements for invoking the state secrets privilege, *id.* at 39a n.16, nor contended that the privilege "has no role in these proceedings," *id.* at 28a. Instead, the court explained, petitioner challenged "the [district] court's determination that state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure." *Ibid.*

In rejecting that record-based contention, the court of appeals explained that "[t]he controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets," but whether the action "can be *litigated* without threatening the disclosure of such state secrets." Pet. App. 40a. The court concluded that the facts central to this action include "the roles, if any, that the defendants played in the events [petitioner] alleges," and other matters that

would "expose[] how the CIA organizes, staffs, and supervises its most sensitive intelligence operations." *Id.* at 41a. The court further determined that petitioner could not establish a prima facie case without such facts, and the defendants could not mount valid defenses without recourse to them. *Id.* at 41a-43a. The court emphasized that "virtually any conceivable response to [petitioner's] allegations would disclose privileged information," *id.* at 43a, and that "the extensive information [the classified declaration] contains is crucial to our decision in this matter." *Id.* at 48a.

The court of appeals accordingly found it unnecessary to address petitioner's argument that "publicly reported information concerning his alleged rendition is ineligible for protection under the state secrets doctrine simply because it has been published in the news media." Pet. App. 46a n.17. The court explained that, even assuming *arguendo* that petitioner were correct about the effect of such reporting, "his appeal would fail" because "the public information does not include the facts that are central to litigating his action." *Id.* at 46a & n.17.

Finally, the court of appeals rejected petitioner's argument that the case should proceed pursuant to "some procedure under which state secrets would have been revealed to him, his counsel, and the court, but withheld from the public." Pet. App. 46a. The court of appeals relied on this Court's holding in *Reynolds*, 345 U.S. at 10, that, when "the occasion for the privilege is appropriate . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." Pet. App. 46a-47a. In doing so, the court of appeals emphasized that "the state se-

crets doctrine does not represent a surrender of judicial control over access to the courts," because the Judiciary determines both whether the privilege has been properly invoked and whether a case could be fairly litigated without state secrets. *Id.* at 47a-48a.

## ARGUMENT

The court of appeals correctly determined that "pursuant to the standards that [petitioner] has acknowledged as controlling, the district court did not err in dismissing his Complaint at the pleading stage," because the "central facts [underlying this action]—the CIA means and methods that form the subject matter of [petitioner's] claim—remain state secrets." Pet. App. 46a. The court of appeals' unanimous decision applying established legal principles to the highly classified facts of this case accords with the district court's conclusion after reviewing the same classified facts, and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. The basic legal principles governing this case are well established. The state secrets privilege is deeply rooted in both "the law of evidence," *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953), and the Executive's "Art. II duties" to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). The government has a "compelling interest" in protecting national security information, and the responsibility to do so "falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege "belongs to the Government," which must assert it in a "formal claim of privilege, lodged by the head of the department which has

control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). The privilege applies when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. While "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," *id.* at 8, the Executive's invocation of the privilege is entitled to the "utmost deference," *Nixon*, 418 U.S. at 710. Moreover, in the course of considering the Executive's privilege claim, a court must not "forc[e] a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8.

When properly invoked, the privilege is absolute: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11. Thus, when the privilege applies, the privileged evidence is removed altogether from the case. See *id.* at 10-11. Moreover, "public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-147 (1981) (emphasis added) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876)).

Accordingly, as this Court recently reaffirmed in its unanimous decision in *Tenet* v. *Doe*, 544 U.S. 1 (2005), while cases can sometimes proceed without state secrets, see *Reynolds*, 345 U.S. at 11, a case must be dismissed if a fact "central to the suit" is such a secret. *Tenet*, 544 U.S. at 9; see, *e.g.*, *Weinberger*, 454 U.S. at 146-147 (holding that environmental suit challenging

classified activity on military base must be dismissed); *Tenet*, 544 U.S. at 9 (holding that action premised on secret espionage relationship must be dismissed); *Totten*, 92 U.S. at 107 (same).

b. As the court of appeals explained, petitioner has not disputed that the CIA Director properly invoked the state secrets privilege and that "at least some information important to his claims is likely to be privileged, and thus beyond his reach." Pet. App. 28a; see *id.* at 39a n.16; Pet. C.A. Br. 8, 19 n.21. Nor did petitioner dispute in the court of appeals that a case must be dismissed at the pleading stage if its central facts are state secrets. Pet. App. 39a-40a; see Pet. C.A. Br. 8, 28. Instead, petitioner raised the fact-bound claim, which he continues to assert in this Court (Pet. 25-26), that "[t]he central facts of this case are not state secrets" because there have been public reports about some aspects of a detention and interrogation program.

That fact-bound contention is meritless and in any event does not warrant this Court's review. It is true that, at a high level of generality, the government has disclosed the CIA's participation in a program involving detention and interrogation of suspected terrorists. Pet. App. 27a-28a. But as the court of appeals explained, the facts that would be central to the adjudication of this action are not limited to any such general disclosures, but instead concern the highly classified methods and means of the program, including "the roles, if any, that the defendants played in the events [petitioner] alleges." *Id.* at 41a.

For example, "[t]o establish a prima facie case, [petitioner] would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and inter-

rogation in a manner that renders them personally liable to him." Pet. App. 41a. Significantly, "[s]uch a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations," including any espionage relationship it might have with the John Doe defendants and the defendant corporations. *Ibid.*

Moreover, most of the public reports relied on by petitioner do not vitiate the privilege even as to the matters discussed in those reports. Petitioner has correctly conceded that, because the privilege belongs to the government, only the government can waive it. Pet. C.A. Reply Br. 16. While there have been reports in the media and elsewhere about the allegations underlying this case, such media reports do not reflect the government's official view and are not necessarily accurate. Court-adjudicated confirmations or denials of those matters would harm our national security, in part because they would provide our enemies with a more reliable source of information. See, *e.g.*, *Halkin* v. *Helms*, 690 F.2d 977, 994 (D.C. Cir. 1982) (*Halkin II*); *Halkin* v. *Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978) (*Halkin I*).[1]

c. Both lower courts also relied heavily on CIA Director Goss's classified declaration, which the government submitted ex parte and in camera because of its highly classified nature. The court of appeals empha-

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[1] Contrary to petitioner's contention (Pet. 26), *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), did not "reject[] [a] portion of [a] privilege claim on [the] ground that so much relevant information was already public." Instead, it remanded to the district court for further consideration of whether certain information was privileged. *Id.* at 61, 70. Here, the lower courts already considered and unanimously rejected petitioner's privilege argument. Pet. App. 12a-14a, 45a-46a & n.17.

sized that the "extensive information" in that declaration is "crucial," while the district court observed that the declaration provided "firm support" for its decision. Pet. App. 12a, 48a.

Like the lower courts' decisions, however, this public brief cannot discuss the significance of the classified information further without "forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. Upon request, the government will make the classified declaration available to the Justices of this Court under appropriate security measures. For present purposes, however, the key point is that the lower courts' application of settled legal principles to the highly classified facts of this case, and the unanimous conclusion of all four judges who considered those facts that dismissal was warranted in the circumstances, does not warrant further review. See Sup. Ct. R. 10.

2. Petitioner now categorically argues (Pet. 12, 24) that dismissal is warranted, if at all, only after the parties conduct full discovery and the court considers the claim of privilege with respect to each specific piece of evidence on an item-by-item basis. That argument was not pressed below. To the contrary, in the court of appeals, petitioner did not dispute that "dismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure." Pet. App. 39a-40a; see Pet. C.A. Br. 8 (conceding that "dismissal at the pleading stage [is] permissible" when "the 'very subject matter' of a suit is a state secret"); *id.* at 28 (same).

Petitioner's newly minted contention that dismissal is never permissible at the pleading stage should be deemed forfeited. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*,

425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, that contention is refuted by this Court's decisions requiring the dismissal of suits because they could not be litigated without recourse to state secrets, see *Tenet*, 544 U.S. at 9; *Weinberger*, 454 U.S. at 146-147; *Totten*, 92 U.S. at 107, as well as historical practice.[2] While petitioner now argues (Pet. 15) that *Tenet* and *Totten* require the pleading-stage dismissal only of cases involving secret espionage relationships, that is wrong. *Totten* required the pleading-stage dismissal of a suit premised on a secret espionage relationship because "[i]t may be stated as a *general principle*, that public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. at 106-107 (emphases added).

In *Weinberger*, this Court followed *Totten*'s general principle in dismissing a case involving an environmental challenge to an alleged activity at a military facility—*not* a secret espionage relationship. 454 U.S. at 146-147. And in *Tenet*, this Court again reaffirmed *Totten*'s general principle, explaining that dismissal was required in both *Tenet* and *Weinberger* because "the fact that was central to the suit" was a state secret the gov-

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[2] Dismissal is hardly uncommon in state secrets litigation. The most recent and authoritative examination of the state secrets privilege concluded that, between 1973 and 2000, courts published at least 63 opinions involving the state secrets privilege, and that the complaints were dismissed as a result of the state secrets privilege in at least 23 of those cases. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007) (forthcoming).

ernment could neither confirm nor deny. 544 U.S. at 9. The *Tenet* Court unanimously rejected the notion that the *Totten* rule was limited to "enforc[ing] the terms of espionage agreements" and underscored that it governed "*any suit* * * * the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 8 (quoting *Totten*, 92 U.S. at 107) (emphasis added by the Court).

Thus, this Court's precedents make clear that, while the need to establish secret espionage agreements is a sufficient basis for dismissal, it is by no means a necessary one. Instead, as this Court's precedents establish, the dispositive question in determining when dismissal is warranted is whether a "fact that [is] central to the suit" is a state secret. *Tenet*, 544 U.S. at 9; see Pet. App. 39a. In this case, all four judges that considered that question after reviewing the classified facts answered it in the affirmative.

There is no logical basis for petitioner's assertion (Pet. 24) that cases may not be dismissed before discovery even if it is evident at the outset that they could not proceed to judgment without recourse to state secrets. As the court of appeals recognized, some state secrets cases can advance beyond the pleading stage because, in some circumstances, non-sensitive discovery may enable the parties to litigate the case. See *Reynolds*, 345 U.S. at 11; Pet. App. 35a. But regardless of whether a case falls more squarely in the *Totten* or *Reynolds* line of cases, when a court determines that the case cannot proceed to judgment without the disclosure of state secrets, further litigation is barred under settled precedent. Such litigation not only would be pointless, but would threaten the disclosure of the very privileged informa-

tion that the state secrets privilege is designed to protect.[3]

3. While petitioner asserts numerous circuit conflicts (Pet. 16-24), none of them actually exists. All of petitioner's cases apply the same basic legal principles. To the extent that they reach different outcomes, they reflect fact-bound applications of those settled principles to differing facts.

a. Petitioner argues (Pet. 22-23) that the courts of appeals are divided on the level of deference due the government's invocation of the privilege. They are not. This Court long ago settled that issue by explaining that while "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," *Reynolds*, 345 U.S. at 8, the Executive's claim is entitled to "utmost deference." *Nixon*, 418 U.S. at 710. Such deference protects the Executive's Article II responsibility to safeguard national security information, and accounts for the fact that the Executive Branch is in a far better position than the courts to evaluate the national security and diplomatic consequences of releasing sensitive information. See *ibid.*; Pet. App. 33a.

No court of appeals has questioned that standard. Petitioner quotes language from two D.C. Circuit decisions stating that courts must not merely rubber-stamp Executive decisions. Pet. 22-23 (citing *In re United States*, 872 F.2d 472, 475, cert. dismissed, 493 U.S. 960

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[3] Petitioner's contention (Pet. 11-12) that the state secrets privilege is strictly evidentiary is refuted not only by this Court's *Weinberger*, *Totten*, and *Tenet* decisions dismissing suits because they could not be litigated, but also by this Court's recognition in *Nixon* that the privilege has a constitutional dimension because it protects the President's constitutional duty to safeguard national security information. See p. 7, *supra*.

(1989); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 60 (1983), cert. denied, 465 U.S. 1038 (1984)). But that recognition is fully consistent with the utmost deference standard because applying the utmost deference standard does not make the courts a rubber stamp. As the court of appeals explained, utmost deference is not absolute deference. Pet. App. 32a-33a, 47a-48a; see, *e.g.*, *Ellsberg*, 709 F.2d at 60 n.44. Indeed, *In re United States* expressly recites and follows the "utmost deference" standard, as do other D.C. Circuit decisions. See *In re United States*, 872 F.2d at 475; see also *Halkin I*, 598 F.2d at 9.

b. Petitioner also argues (Pet. 16, 23) that there is "confusion" about whether the state secrets privilege must be asserted "on an item-by-item basis with respect to particular disputed evidence," or instead can be asserted as to categories of evidence based on an affidavit of the head of the department claiming the privilege. This Court has already resolved that question as well, holding that it "will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Reynolds*, 345 U.S. at 10. Rather, "[i]t may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Ibid.* "When this is the case," the *Reynolds* Court declared, "the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence*, even by the judge alone, in chambers." *Ibid.* (emphasis added).

In keeping with *Reynolds*, the court of appeals correctly explained that an affidavit is sufficient in some

cases, but that in others "a court may conduct an in camera examination of the actual information sought to be protected." Pet. App. 34a. In situations like this one, where a sworn declaration of the head of the department makes clear that an entire category of information is protected, there is no reason to require the government to provide further classified documents or logs to the court. Such a requirement not only would be unnecessarily burdensome for the government and the courts alike, but would pointlessly endanger national security by requiring the collection and disclosure (to the court) of more classified information than necessary—precisely what *Reynolds* rejects.

Petitioner's reliance (Pet. 23) on *Ellsberg, supra*, is unavailing because the D.C. Circuit made clear in that case that one-size-fits-all procedures are *not* appropriate, on the ground that "there is considerable variety in the situations in which a state secrets privilege may be fairly asserted." 709 F.2d at 63. In *In re United States, supra* (cited at Pet. 16), the D.C. Circuit likewise found only that an item-by-item inquiry was appropriate "on the facts of the case." 872 F.2d at 478, 479. In another case that petitioner relies on for a different proposition (Pet. 19), the D.C. Circuit specifically rejected the argument that the government had to produce a detailed privilege log instead of relying on affidavits describing the underlying state secrets concerns. *Halkin II*, 690 F.2d at 995-997; cf. *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (cited at Pet. 23) (stating only that "a party's showing of need often compels the district court to conduct an *in camera* review of documents").

c. Petitioner similarly argues (Pet. 17-22) that the courts of appeals are divided on whether a case can ever be dismissed on state secrets grounds at the pleading

stage, or instead may be dismissed only after the parties exhaust all non-privileged discovery and the courts fully consider all non-privileged evidence. As discussed, petitioner did not argue below that pleading-stage dismissals are improper when the central facts of the case are privileged, and there is no justification for requiring further proceedings in a case once it becomes apparent that the case cannot proceed to judgment. See p. 11, *supra*. Whenever that point is reached in a particular case, dismissal is required because further proceedings would only serve pointlessly to jeopardize national security by risking the disclosure of classified information. Indeed, further discovery in such circumstances would likely be far more dangerous to national security than the in camera procedures rejected in *Reynolds*. See 345 U.S. at 10.

Accordingly, no court of appeals has held that dismissal is improper at the pleading stage when, as here, the case could not proceed to judgment without recourse to privileged information. Petitioner argues in broad terms that "[t]he central facts of this case are not state secrets." Pet. 25. But all four of the judges below who had access to the government's classified submission in this case—not to mention the top government officials whose job it is to assess and protect foreign intelligence—have disagreed with that contention.

Petitioner's reliance (Pet. 19) on *In re United States*, *supra*, is misplaced. In that case, the D.C. Circuit denied the "exceptional" remedy of mandamus because it concluded, in a decision that "largely turn[ed] on the facts of the case," that it was "unconvinced that the district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfolds." 872 F.2d at 479; see *Ellsberg*, 709 F.2d at 64 n.55 (cited

at Pet. 20) (requiring district court to "consider whether plaintiffs were capable of making out a *prima facie* case without the privileged information").

Petitioner's reliance (Pet. 19-20) on *Halkin II* is equally misplaced. In the *Halkin* litigation, the D.C. Circuit affirmed the district court's dismissal, at an early stage, of all claims concerning a classified surveillance program. *Halkin I*, 598 F.2d at 5. The court explained that "[n]o amount of ingenuity of counsel in putting questions on discovery can outflank the government's objection that disclosure of [a] fact is protected by privilege." *Id.* at 6-7. While discovery proceeded on challenges to a different program, that fact only underscores the contextual nature of the inquiry.

The D.C. Circuit recently confirmed that point by upholding the dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) because, as in this case, the privilege precluded the plaintiff from proving the claims as to a particular defendant (an alleged CIA employee). *In re Sealed Case*, No. 04-5313, 2007 WL 2067029, at *1, *7 (June 29, 2007). *In re Sealed Case* further underscored the inherently contextual nature of the inquiry by affirming the Rule 12(b)(6) dismissal of claims against one defendant but not the other. *Ibid.*; see *id.* at *5; see also pp. 20-22, *infra* (discussing *In re Sealed Case*).

Petitioner asserts that the Fourth Circuit is on both sides of his claimed circuit split. Pet. 18, 20, 21 (citing *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *DTM Research, L.L.C.* v. *AT&T Corp.*, 245 F.3d 327, 334-335 (4th Cir. 2001)). Such an intracircuit conflict would not be a basis for the Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no intracircuit conflict here because, while peti-

tioner asserts (Pet. 18-19) that *DTM Research* "recogniz[es] the impossibility of determining at the pleading stage what evidence would be relevant and necessary to the parties' claims and defenses," that case actually holds that dismissal is appropriate where (as here) "the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." 245 F.3d at 334 (internal quotation marks and citation omitted).

Petitioner similarly appears to place a single decision, *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993), on both sides of the asserted conflict, because he puts *Bareford* not only on the side that permits pleading-stage dismissals, Pet. 18, but also on the side that requires "full presentation of all non-privileged evidence," Pet. 20. The reason that *Bareford* is not in conflict with itself is the same reason that there is no conflict at all: Instead of following rigid rules concerning the amount of discovery needed before dismissal, the Fifth Circuit, like all others, requires dismissal when it is apparent, in the context of the case, that "plaintiffs would be unable to prove their case without classified information and that the very subject matter of the trial is a state secret." 973 F.2d at 1140.

The Federal Circuit cases cited by petitioner (Pet. 19, 20) are distinguishable for the same reasons. In *Crater Corp.* v. *Lucent Techs., Inc.*, 423 F.3d 1260 (2005), cert. denied, 126 S. Ct. 2889 (2006), for example, the Federal Circuit simply remanded because it did "not believe the record in the case * * * is sufficiently developed to enable a determination as to the effect of the government's assertion of the privilege * * * in terms

of [plaintiff's] ability to assert the claims and [defendant's] ability to defend against them." *Id.* at 1268; see *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1361, 1364-1365 (Fed. Cir. 2001) (remanding for non-privileged discovery based on the facts of that case, but emphasizing that judgment for the defendant is appropriate when, "because of the Government's invocation of the state secrets privilege, the plaintiff cannot meet its burden to show that there are genuine factual issues for trial"). Here, by contrast, both the district court and the court of appeals correctly determined that state secrets are central to any attempt to litigate this case. Pet. App. 40a-43a.

d. Nor is there a conflict, as petitioner asserts (Pet. 21-22), about whether or to what extent courts must consider alternatives to dismissal before dismissing. It is common ground, and the court of appeals expressly recognized, that dismissal is required only if a case cannot be litigated without recourse to state secrets; if a case could be litigated based on other evidence without posing a reasonable danger to national security, as the D.C. Circuit thought possible in *In re United States*, 872 F.2d at 479 (cited at Pet. 22), dismissal is inappropriate. See Pet. App. 35a-36a. But here, the district court and the court of appeals correctly determined that state secrets are central to any effort to litigate the case. *Id.* at 40a-43a.[4]

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[4] *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958) (cited at Pet. 22), is not to the contrary. The Second Circuit held in that case that dismissal would have been required under the state secrets doctrine but for a narrow statute permitting in camera trials of patent cases. 258 F.2d at 41, 43-44. Because this is not a patent case, the reasoning of *Halpern* therefore supports dismissal under the state secrets privilege.

e. In a supplemental brief, petitioner argues that the court of appeals' decision conflicts with *In re Sealed Case, supra*. Supp. Br. 1-3. That is incorrect. Like the court of appeals in this case, the D.C. Circuit recognized in that case that dismissal is required when the very subject matter of the action is a state secret, the plaintiff could not establish a prima facie case without recourse to state secrets, or the defendant could not establish a valid defense without such information. 2007 WL 2067029, at *4, *10. Under those standards, the court upheld the Rule 12(b)(6) dismissal of claims against one defendant (an alleged CIA employee) but not the other. *Id.* at *7.

Petitioner argues (Supp. Br. 1-3) that the D.C. Circuit stated that, to require dismissal, a "valid defense" must be meritorious, not just plausible, whereas the Fourth Circuit found "hypothetical defenses" sufficient. Even if the courts of appeals disagreed about the treatment of defenses, however, any such disagreement would be irrelevant to the outcome of this case and therefore would present no genuine conflict. The Fourth Circuit upheld the dismissal of this case not only because state secrets were necessary to valid defenses, but also because the very subject matter of the action is a state secret and because petitioner could not establish a prima facie case without recourse to such secrets. See Pet. App. 40a-43a. By contrast, the D.C. Circuit expressly limited the relevant portion of its opinion to proof of defenses. 2007 WL 2067029, at *9-*10. The D.C. Circuit's opinion therefore has no bearing on two of the three alternative bases for dismissal here.

Moreover, while petitioner proclaims that this case "cannot be reconciled" (Supp. Br. 3) with *In re Sealed Case*, he neglects to mention that the D.C. Circuit itself

distinguished this case on its facts. 2007 WL 2067029, at *8. The D.C. Circuit explained that the Fourth Circuit in this case considered potential defenses in the course of determining that "state secrets are * * * central to [the] proceedings." *Ibid.* In contrast, the D.C. Circuit explained, in *In re Sealed Case*, the defendant "has already revealed his defense"—that he learned information from a third party rather than through illegal means—"and it is unprivileged," because the government did not assert the privilege over either the defendant's relevant contention or the third party's denial of that contention. *Ibid.* The D.C. Circuit also emphasized that, in *In re Sealed Case*, quite unlike this case, the CIA Director himself had conceded that at least some of the privileged and unprivileged information could be "segregated . . . at no risk to U.S. national security." *Id.* at *11 (quoting government declaration).

In concluding that the very subject matter of the case did not require dismissal as to the one defendant, the D.C. Circuit also distinguished this case. As the D.C. Circuit explained, in this case, "the Fourth Circuit dealt with sensitive details of the United States' program of extraordinary rendition for terrorism suspects and the legality of the very classified program covered by the claim of privilege." *In re Sealed Case*, 2007 WL 2067029, at *11. By contrast, in *In re Sealed Case*, the privilege was asserted over only portions of two IG reports, *id.* at *1; the plaintiff had at least some non-privileged circumstantial evidence that he argued supported his claim, *id.* at *6; the CIA Director himself acknowledged that non-privileged information could be segregated and that further litigation was possible with the segregated information, *id.* at *11; and the government

did not argue that any secret espionage relationships were implicated, *id.* at *10.

4. Because petitioner cannot show any conflict of authority, the petition boils down to a request (Pet. 27) that the Court "revisit[]" its state secrets precedents. That request is unfounded and should be denied.

a. While petitioner asserts that the Executive has asserted the privilege more often in recent years, and in different types of cases, the most recent and authoritative scholarly study concludes that "[t]he available data do * * * not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations or in unprecedented substantive contexts." Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007) (forthcoming); see *ibid.* (charts identifying published state secrets decisions by year). Moreover, even if there had been an increase in the government's invocation of the privilege, that would simply reflect an increase in litigation generally, and an increase in litigation challenging classified government programs in particular. *Ibid.*

While petitioner argues (Pet. 28) that the government is now invoking the privilege in cases alleging violations of individuals' civil liberties, that is neither new nor avoidable in some circumstances. In any era, challenges to secretive intelligence-gathering programs lie at the core of the state secrets doctrine. Petitioner himself cites older cases in which the government invoked the privilege and sought dismissal in order to protect against the disclosure of the details of such activities, including where, as here, the existence of the programs was known at some level of generality. See, *e.g.*, *Halkin I*, 598 F.2d at 3; *Ellsberg*, 709 F.2d at 52-53; *In re*

*United States*, 872 F.2d at 473-474. And in *Tenet*, this Court unanimously held that the state secrets doctrine required dismissal of an action that included claims that the government had violated the plaintiffs' constitutional due process rights. 544 U.S. at 5. In any event, the primary point for certiorari purposes is that this Court has already laid down the governing legal principles and, as discussed above, the courts of appeals have consistently applied them to varying factual circumstances without demonstrating any need for further guidance.

b. Petitioner argues (Pet. 27-28) that, unless this Court "revisit[s]" its state secrets cases, the Executive can unilaterally foreclose judicial review of Executive actions. As the court of appeals explained, that is incorrect. Pet. App. 48a-49a. Courts review the Executive's invocation of the privilege, albeit with the requisite deference, and even when the privilege applies, dismissal is not always necessary. See pp. 14-15, *supra*. The Executive is also subject to congressional oversight and other political consequences. Although the privilege does mean that some lawsuits may not proceed, that is necessary in limited circumstances, such as this one, to protect vital state secrets.

The absence of any reason to revisit this Court's settled precedents is underscored by petitioner's proposed alternative (Pet. 29)—that when the government validly invokes the privilege to protect state secrets, the courts should "construe facts in favor of deprived litigants or shift[] burdens against the government." In other words, when a plaintiff brings a lawsuit based on an alleged secret program, the government, in petitioner's view, must either harm national security by disclosing state secrets or effectively concede the lawsuit (which could lead, among other things, to an injunction against

the alleged program). That is untenable, and fundamentally out of step with more than a century of this Court's state secrets jurisprudence.

When the government brings a criminal prosecution, it must sometimes choose between revealing classified information, in order to protect the defendant's due process rights, and "letting the defendant go free." *Reynolds*, 345 U.S. at 12. But as this Court explained in *Reynolds*, which involved an action under the Federal Torts Claims Act, the criminal analogy "has no application in a civil forum where the Government * * * is a defendant only on terms to which it has consented," and is invoking the privilege defensively. *Ibid.*; accord *In re United States*, 872 F.2d at 476.[5] Rather, "[i]t would be intolerable," and would pose grave separation-of-powers concerns, that "courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); accord *Nixon*, 418 U.S. at 710.

Ultimately, therefore, petitioner's extravagant request that this Court overrule its settled precedents in order to adopt an untenable rule of law only serves to confirm that the lower courts' unanimous application of settled legal principles to the highly classified facts of this case does not warrant further review.

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[5] In addition, the Classified Information Procedures Act, 18 U.S.C. App. 3, at 1524, on which petitioner relies (Pet. 29), applies only in criminal cases. See § 2, 18 U.S.C. App. 3, at 1524.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

KHALED EL-MASRI,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES OF COURT APPEALS FOR THE FOURTH CIRCUIT

## SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 15.8, Petitioner Khaled El-Masri submits this supplemental brief to apprise the Court of new authority that creates additional conflict and confusion among the lower courts and underscores the necessity for Supreme Court review.

In *In re: Sealed Case,* -- F.3d. --, 2007 WL 2067029 (D.C. Cir. decided June 29, 2007; unsealed July 20, 2007), the Court of Appeals for the District of Columbia Circuit upheld the government's invocation of the state secrets privilege with respect to documents requested during discovery, but denied the government's motion to dismiss the case. The Court reasoned that dismissal was unwarranted because, even without the privileged evidence, the plaintiff could present a prima facie case, and the defendant was not prevented from asserting a valid defense.

The district court, applying the same standard that the Fourth Circuit applied in *El-Masri*, had held that the plaintiff's case must be dismissed because there were "possible defenses" that might be foreclosed without recourse to privileged evidence. *In re: Sealed Case*, 2007 WL 2067029, at *8.[1] In reversing that ruling, the D.C. Circuit explained that dismissal on that ground is appropriate solely when the unavailability of privileged evidence deprives the defendant of a *valid* defense -- not simply a hypothetical one. That is, unless the state secrets privilege results in the elimination of a "meritorious and not merely plausible" defense, a case may not be dismissed. *Id.* at *9. The court elaborated: "Were the valid-defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning

[1] For the Court's convenience we have included a copy of the opinion in the Appendix to this brief.

the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture." *Id.*

In contrast, the Fourth Circuit in *El-Masri* upheld the pleading-stage dismissal of Petitioner El-Masri's case in part because of its assumption that state secrets would deprive the defendants of *possible* defenses:

> If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged. Alternatively, if the CIA detained El-Masri, but did so without Director Tenet's active involvement, effective proof thereof would require a detailed explanation of how CIA operations are supervised. Similarly, although an individual CIA officer might demonstrate his lack of involvement in a given operation by disclosing that he was actually performing some other function at the time in question, establishing his alibi would likely require him to reveal privileged information.

*El-Masri v. United States,* 479 F.3d 296, 309 (4th Cir. 2007); *available at* 42a – 43a of the Appendix to the Petition for Writ of Certiorari ("Cert App."). By the court's reasoning, the government was not required to establish that it would be prevented from asserting a valid defense; rather, it was sufficient that the court could imagine scenarios in which the privilege would interfere with potentially available defenses. As the court explained: "We do not, of course, mean to

suggest that any of these hypothetical defenses represents the true state of affairs in this matter, but they illustrate that virtually any conceivable response to El-Masri's allegations would disclose privileged information." Cert App. 43a.

*In re: Sealed Case* expressly repudiates that mode of analysis: "Just as it would be manifestly unfair to permit a presumption of unconstitutional conduct to run against the defendant when the privilege is invoked, it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege." *In re: Sealed Case*, 2007 WL 2067029, at *9 (internal quotations and citation omitted). In short, the standards applied by the D.C. Circuit and the Fourth Circuit cannot be reconciled. *See id.* at *16 (Brown, J., concurring and dissenting) ("The majority's privileged-defense standard is . . . [a] sharp departure from the other circuits"). This Court should grant the petition for certiorari to resolve this and other uncertainties among the lower courts regarding the proper application and scope of the state secrets privilege.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In re SEALED CASE
No. 04-5313

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01756)

Argued: Dec. 14, 2006
Decided: June 29, 2007
Unsealed: July 20, 2007

Before ROGERS, BROWN and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

Concurring and dissenting opinion filed by Circuit Judge BROWN.

## OPINION

ROGERS, *Circuit Judge:* In this appeal, the court must decide whether the state secrets privilege requires the dismissal of Richard A. Horn's complaint alleging the violation of his Fourth Amendment rights. We affirm the district court's determinations that the United States properly invoked the privilege and that the complaint must be dismissed against one of the defendants. However, we hold that Horn can establish a *prima facie* case without using the privileged information. Accordingly, we reverse the dismissal of his complaint against the remaining defendant and remand the case to the district court to consider whether Horn's case can proceed.

## I.

According to the complaint, in 1993, Horn was stationed in Rangoon, Burma, as the country attaché for the United States Drug Enforcement Agency ("DEA"). He had a strained professional relationship with the State Department Chargé d'Affaires, Franklin "Pancho" Huddle, Jr., arising from the differing policy goals of their agencies, and he believed that Huddle was seeking information to justify Horn's transfer to another station outside of Burma. When Horn discovered that Huddle had sent a classified State Department cable allegedly transcribing a telephone call that Horn had made to a subordinate from his residence, he concluded that Huddle was engaging in electronic eavesdropping in violation of the Fourth Amendment.

In 1994, Horn filed a *Bivens*[1] action against Huddle and a second unnamed defendant ("Defendant II"), allegedly an employee of the Central Intelligence Agency ("CIA"), whose identity is classified. The United States intervened in 2000 and asserted the state secrets privilege with respect to portions of two internal investigations by agency inspectors general ("IG reports") that had been conducted in response to Horn's allegations. The district court sustained the claim of privilege. The government filed a classified motion to dismiss the complaint on November 7, 2000, and provided a redacted copy to Horn. Horn responded with a motion to proceed with discovery under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. III, on November 13, 2000, deferring any response to the government's motion

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[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Horn's complaint also alleged violations of anti-wiretapping statutes and conspiracy; these claims were dismissed in 1997. A putative class action filed by Horn was dismissed in 2000. Horn does not pursue these matters on appeal.

until the district court resolved his proposal to proceed under CIPA and his prior motion seeking security clearance for his attorney's secretaries.

Nearly four years later,[2] on July 28, 2004, the district court granted the government's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and dismissed Horn's outstanding motions as moot. The district court ruled that dismissal was required on three independent grounds: (1) the plaintiff cannot make out a *prima facie* case absent the protected material; (2) the state secrets privilege deprives the defendants of information required in their defense; and (3) the subject matter of the plaintiff's complaint is a state secret.

Horn appeals, and our review of the dismissal of his complaint is *de novo*. *See, e.g., Broudy v. Mather,* 460 F.3d 106, 116 (D.C. Cir. 2006).

## II.

The state secrets privilege "is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security." *In re United States,* 872 F.2d 472, 474 (D.C. Cir.), *cert. denied sub nom. United States v. Albertson,* 493 U.S. 960 (1989). It has "its initial roots in Aaron Burr's trial for treason, *United States v. Burr,* 25 F. Cas. 30 (C.C.D. Va. 1807), and has its modern roots in *United States v. Reynolds,* 345 U.S. 1 (1953)." *Id.* at 474-75. In *Reynolds,* the Supreme Court held that because the Federal Tort Claims Act ("FTCA") subjects the United States to liability only insofar as Congress has consented, and because the FTCA expressly incorporates the Federal Rules of Civil Procedure, the United

[2] The district court judge to whom the case was originally assigned died and the case was reassigned in 1999.

States may claim a privilege against discovery of military and state secrets, pursuant to Fed. R. Civ. P. 34, through a formal request "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 345 U.S. at 6-8 (footnote omitted). The Court observed that the "constitutional overtones" were "unnecessary to pass upon, there being a narrower [statutory] ground for decision." *Id.* at 6. In *Reynolds*, "*[i]t* [wa]s . . . apparent that the [] electronic devices [that were being tested in flight when the military airplane crashed and killed the plaintiffs' spouses] must be kept secret if their full military advantage is to be exploited in the national interests." *Id.* at 10. The Court remanded the case to proceed without the privileged materials, *id.* at 12, having noted that because the surviving crew members were available for examination, "it should be possible for [the plaintiffs] to adduce the essential facts as to causation without resort to material touching upon military secrets," *id.* at 11.

On appeal, Horn contends that the state secrets privilege may not be invoked in a *Bivens* action and, alternatively, that his case may proceed with non-privileged materials, including a declassified redacted cable and other circumstantial evidence suggesting that Huddle and Defendant II violated Horn's constitutional rights. We first address Horn's challenge to the application of the privilege in a *Bivens* action and his alternative contention that the United States did not properly invoke the privilege. Neither contention is persuasive.

**A.**

Unlike the plaintiffs in *Reynolds*, Horn does not rely upon the FTCA's limited waiver of sovereign immunity. As a result, he contends that the privilege is unavailable to the United States. Horn's complaint invokes *Bivens*, which

provides that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials" notwithstanding the lack of an explicit statutory cause of action, 403 U.S. at 395-97. The district court ruled that it was " settled, indisputable law" that the Fourth Amendment protects American citizens abroad, *see, e.g., United States v. Behety,* 32 F.3d 503, 510-11 (11th Cir. 1994); *United States v. Mount,* 757 F.2d 1315, 1317-18 (D.C. Cir. 1985), and the United States does not challenge that ruling on appeal.

The distinction pressed by Horn between constitutional claims and those based on statutory grounds means that *Reynolds* holding on statutory grounds does not control. Nonetheless, it hardly follows that the privilege evaporates in the presence of an alleged constitutional violation. Horn identifies no legal authority to support this conclusion. Instead, the nature of the state secrets privilege compels the conclusion that the United States may claim the privilege as to evidence relevant to a constitutional claim. Even in constitutional cases, Congress "has plenary authority over the promulgation of evidentiary rules for the federal courts." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 31 (1976); *see also Hawkins v. United States,* 358 U.S. 74, 78, 79 (1958); *Tot v. United States,* 319 U.S. 463, 467 (1943). The federal rules of evidence provide that claims of privilege are to be "governed by the principles of the common law . . . in the light of reason and experience." Fed. R. Evid. 501; *see United States v. Green,* 670 F.2d 1148, 1155 n.10 (D.C. Cir. 1981). In *Reynolds,* the Supreme Court made clear that "the privilege against revealing military secrets . . . is well established in the law of evidence." 345 U.S. at 6-7.

Although the rules of evidence must yield when they offend the constitutional trial rights of litigants, *see Tot,* 319 U.S. at 467; Fed. R. Evid. 501, Horn identifies no trial right that is

being abridged. In Horn's view, it is the constitutional nature of his underlying claim that entitles him to escape the binds of the federal rules. We can find no support for this position, which would essentially allow any constitutional claim to repress any rule that withholds evidence for reasons other than relevance, *see, e.g.*, Fed. R. Evid. 403, 407, 411, 802. The federal rules are premised on a distinction between substantive claims and the evidence used to prove the claims. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965). Although evidentiary matters are governed by the rules, they cannot modify litigants' substantive rights as to either constitutional or statutory matters. *See* 28 U.S.C. § 2072(b); *cf. Webster v. Doe*, 486 U.S. 592, 603-04 (1988). Thus, so long as the state secrets privilege operates as a rule of evidence, *see Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *In re United States*, 872 F.2d at 474, and not as a means to modify Horn's substantive constitutional rights, we hold that it may be invoked by the United States in a *Bivens* action. *See also El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir.), *petition for cert. filed*, 75 U.S.L.W. 3663 (U.S. May 30, 2007) (No. 06-1613); *Black v. United States*, 62 F.3d 1115, 1117 (8th Cir. 1995); *Halkin v. Helms*, 690 F.2d 977, 987 & n.42 (D.C. Cir. 1982) (*"Halkin II"*).

**B.**

Notwithstanding the deference due to Executive Branch claims of privilege, the Supreme Court instructed in *Reynolds* that the state secrets privilege is not to be "lightly invoked," 345 U.S. at 7, because, as this court has observed, once invoked, the privilege is " absolute" and "cannot be compromised by any showing of need on the part of the party seeking the information," *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984). Accordingly, this court has emphasized that the district court must scrutinize the claim of privilege more carefully when

the plaintiff has " made a compelling showing of need for the information in question," *Ellsberg v. Mitchell*, 709 F.2d 51, 59 n. 37, 61 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *see Reynolds*, 345 U.S. at 11, and this court's review of the district court's determination that the "affidavits [are] adequate to establish the reasonable danger of injury," is for abuse of discretion, *Halkin II*, 690 F.2d at 991. To sustain the assertion of privilege, the district court need not have complete knowledge of how disclosure would cause a specific security breach, *see In re United States*, 872 F.2d at 475; it is sufficient that the reports present "a reasonable danger of divulging too much to a 'sophisticated intelligence analyst,'" *id.* (quoting *Halkin v. Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978) ("*Halkin I*")). As the Supreme Court observed in *Reynolds*, where it is possible to determine "from all the circumstances of the case" that such danger exists, "the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10.

The district court reviewed the unclassified declarations of then-Director of Central Intelligence George J. Tenet and then-Deputy Secretary of Defense John J. Hamre, which set forth their personal consideration of Horn's allegations and the national security interests involved, as well as additional classified declarations filed *ex parte* and *in camera*. The district court also requested the *ex parte, in camera* submission of the reports subject to the claim of privilege. On the basis of its review, the district court concluded that national security would be compromised if the portions of the IG reports for which the United States claimed a privilege were disclosed. Specifically, the district court found that releasing those portions of the IG reports would create the risk of revealing covert operatives, organizational structure and functions, and intelligence-gathering sources,

methods, and capabilities.

Upon review of the IG reports and the affidavits submitted by the United States, we find no abuse of discretion by the district court in ruling that the United States has made the requisite showing as to the portions of the two IG reports over which the United States claimed privilege. Hence, these portions of the IG reports were properly stricken as evidence in the case.

## III.

When the state secrets privilege is successfully invoked, "[t]he effect . . . is well established: '[T]he result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence.'" *Ellsberg*, 709 F.2d at 64 & n.56 (quoting McCormick's Handbook of the Law of Evidence 233 (E. Cleary ed., 1972) and citing the advisory committee's note to Prop. Fed. R. Evid. 509(d), 56 F.R.D. 183, 254 (1972), which "was rejected by Congress for reasons unrelated to the Committee's recognition of th[is] principle"). Government participation in the case results in "no alteration of pertinent substantive or procedural rules." *Id.* at 64. In general, against a motion to dismiss, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968 (2007), "construing the complaint liberally in the plaintiff's favor with the benefit of all reasonable inferences derived from the facts alleged." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). In the context of the state secrets privilege, the court has recognized that where, as here, the plaintiff is not in possession of the privileged material, "dismissal of the relevant portion of the suit would be proper only if the

plaintiff[] w[as] manifestly unable to make out a *prima facie* case without the requested information." *Ellsberg*, 709 F.2d at 65; *see also In re United States*, 872 F.2d at 476. We address each of the grounds on which the district court dismissed the complaint.

A.

The district court ruled that Horn could not make out a *prima facie* case without the use of privileged information. In many state secrets cases, a plaintiff has no prospects of evidence to support the assertions in his complaint and this lack of evidence requires dismissal. *See, e.g., Ellsberg*, 709 F.2d at 65; *Halkin I*, 598 F.2d at 10-11; *see also El-Masri*, 479 F.3d at 308-09; *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140-42 (5th Cir. 1992); *Zuckerbraun*, 935 F.2d at 547. Here, however, Horn is not without evidence. As the United States acknowledged through the Director of Central Intelligence, "[c]ertain documents appearing as joint report attachments [to one of the IG reports] and which contain little or no state secrets information can be segregated (in redacted or unredacted form, respectively) at no risk to U.S. national security." Tenet Decl. ¶ 33. Thus, although Horn cannot access the privileged portions of the IG reports, the question remains whether he can make out a *prima facie* case for a *Bivens* violation with the unprivileged evidence. At this stage of the proceedings, Horn must supply sufficient allegations that a federal agent, acting under color of his authority, violated his Fourth Amendment rights, but he need not disprove possible defenses. *See Bivens*, 403 U.S. at 389; *Ellsberg*, 709 F.2d at 68.

Horn's basic claim is straightforward: Late at night on August 12, 1993, he placed a phone call from his personal residence to a DEA subordinate, David Sikorra. He

expressed concern that Huddle was trying to expel him from Burma and that DEA might respond by closing its Burma office. Soon thereafter, Horn learned of a cable, since declassified in part, that Huddle sent to State Department officials in Washington, D.C. This cable, which is dated August 13, 1993, contains an unclassified paragraph that reads:

> Finally, Horn shows increasing signs of evident strain. Late last night, for example, he telephoned his junior agent to say that "I am bringing the whole DEA operation down here." "You will be leaving with me . . . We'll all leave together." In this context, he then went on to note talks with [DEA officials] Greene and Maher without explicitly drawing a connection.

Cable from Franklin Huddle, American Embassy, Rangoon, Burma, to Secretary of State, Washington, D.C. ¶ 6 (Aug. 13, 1993) ("Huddle Cable") (ellipses in original). On the basis of this cable, which Horn claims quotes him verbatim, Horn concluded that someone was eavesdropping on his personal conversation with Sikorra.

In an unclassified and unprivileged affidavit submitted to the district court, Huddle insisted instead that Horn's conversation had spread by word of mouth. Huddle averred that he told the IG investigators that the information in the cable was provided to him by DEA Special Agent Bruce Stubbs. Special Agent Stubbs, for his part, denied, in the declassified portion of the IG report, telling anything to Huddle about Horn's conversation with Sikorra. According to unclassified and unprivileged information, Stubbs was on official travel during the relevant time period and told IG investigators that he neither saw Huddle in person nor contacted him by telephone. Stubbs insisted that he did not learn of Horn's conversation with Sikorra until he returned to

Rangoon on August 26, 1993, almost two weeks after Huddle sent the cable to the State Department. Further, Stubbs swore in an unclassified and unprivileged affidavit that Huddle had contacted him while the IG investigation was pending to discuss how Stubbs had told Huddle about Horn's statement. Stubbs averred that he had no such recollection and that Huddle's telephone call was improper, to which Huddle responded that he was merely "prescreening [Stubbs] to determine [his] recollections of Horn's allegations." Stubbs Aff. para. 8. This aspect of Stubbs' affidavit is supported by a file memorandum that he wrote on September 22, 1994, the day after he was contacted by Huddle. When confronted with Stubbs' affidavit, Huddle told investigators in writing that he "stand[s] by [his] statement." Huddle Stmt. (Nov. 7, 1995).

Horn thus contends, in view of the unclassified and unprivileged materials, that he has demonstrated a *prima facie* case because the district court found that the redacted cable showed eavesdropping as the source of information, and the declassified interviews with personnel then stationed at the Embassy in Rangoon establish that Huddle did not learn of Horn's conversation, either verbatim or otherwise, from Stubbs or anybody else, leaving unconstitutional surveillance as the only remaining option. Although Horn has no direct evidence that Huddle participated in an unlawful surveillance, he relies on the following circumstantial evidence:

First, in November 1992 there was a suspicious entry into his apartment in Burma when, unsolicited, his government-issued rectangular coffee table was swapped for an oval replacement while he was out of town. He was advised that his "original coffee table was needed to complete a sofa set at another residence." Memorandum from Richard A. Horn on Questionable Furniture Movement

para. 3 (Feb. 27, 1995). Horn characterized this conduct as "peculiar" and notes that "[a] telephone was located in this room within close proximity to the aforementioned coffee table." *Id.* para. 4.

Second, Horn traces the limited spread among Embassy personnel of his conversation with Sikorra, emphasizing that Huddle's source was specific enough to allow Huddle to use quotation marks and ellipses in the cable. In declassified statements, Sikorra explained that he told only a secretary, Mary Weinhold, about the disturbing telephone call; Mrs. Weinhold explained that no one could have overheard her conversation with Sikorra and that she does not recall having told her husband, who also worked at the Embassy, about Horn's conversation; Mr. Weinhold corroborated his wife's recollection; and Huddle's deputy at the Embassy stated his belief that Huddle was aware of the conversation between Horn and Sikorra before he was.

The district court "verified that indeed, [the Huddle cable] is a *verbatim* reproduction of parts of Horn's conversation with Sikorra, using quotation marks and ellipses, and a paraphrasing of other parts-evidence that Horn's conversation had been wiretapped." Mem. Op. of Feb. 10, 1997, at 4. Nonetheless, the district court found Horn's allegations insufficient to establish a *prima facie* case. Mem. Op. of July 28, 2004, at 10. The district court reasoned that Defendant II's identity is protected and that there is no unprivileged evidence connecting him to Horn's allegations. As to both defendants, the district court concluded,

> [a]t most [Horn] has a dispute about whether or not [Huddle] learned the information from another person or from [unconstitutional surveillance]. But [Horn] cannot establish a *prima facie* case by offering any evidence that [surveillance] occurred. Therefore,

> [Horn]'s case must be dismissed because [Horn] cannot establish a *prima facie* case against either defendant.

*Id.* at 10-11 (italics added).

As to Defendant II, the district court's reasoning is persuasive. Nothing about this person would be admissible in evidence at a trial, so even construing the allegations in the complaint liberally does little for Horn's claim. However, as to Huddle, we are unpersuaded that Horn could prove no facts that would lead a reasonable jury to conclude that Huddle had violated his constitutional rights. Although Horn's case is premised on circumstantial evidence, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 n.3 (1983); *see also Doe v. U.S. Postal Serv.,* 317 F.3d 339, 343 (D.C. Cir. 2003). Horn can point to the highly suspicious use in the cable of quotation marks and ellipses that creates an inference that the conversation has been transcribed, the seeming impossibility that Huddle would have learned of the conversation by lawful means, and the inconsistencies underlying Huddle's explanation about how he learned of the conversation. Further, even if a reasonable jury found that Horn's conversation with Sikorra was gossip-worthy and might have spread through the Embassy, it could still reasonably infer that eavesdropping had occurred from the following sentence in the cable, which appears less likely to have spread through office chatter: "In this context, he then went on to note talks with Greene and Maher without explicitly drawing a connection." Huddle Cable ¶ 6.

Against this proffer of evidence by Horn, the United States offers that "[Horn's] unsupported assertions [about eavesdropping] rely on hearsay concerning the

[investigations by the] Inspectors General, and cannot be the subject of more proof because the contents of [portions of] the Inspector General reports are privileged." Appellees' Br. at 35 n.12. This argument fails for two reasons. First, to avoid dismissal of his complaint under Fed. R. Civ. P. 12(b)(6), Horn need not plead the facts sufficient to prove his allegations and evidence that will ultimately be used at trial. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 671 (D.C. Cir. 2005); *Warren v. District of Columbia*, 353 F.3d 36, 39-40 (D.C. Cir. 2004); Fed. R. Civ. P. 8(a). Second, although the IG reports are privileged in part, the interviews Horn could rely upon, such as those with Embassy personnel, would involve conversations that have been declassified. As such, there would be no barrier to his calling the affiants as witnesses in order to testify to these unclassified matters, which are not subject to the state secrets privilege. Thus, even after evidence relating to covert operatives, organizational structure and functions, and intelligence-gathering sources, methods, and capabilities is stricken from the proceedings under the state secrets privilege, Horn has alleged sufficient facts to survive a motion to dismiss under Rule 12(b)(6).

**B.**

The district court also ruled that Horn's complaint must be dismissed because without the state secrets evidence the defendants must proceed without materials they would need to mount possible defenses. As a general principle, privileged evidence is unavailable to either party, and neither party may rely upon the stricken evidence to its advantage. The Supreme Court in *Reynolds* thus admonished that the state secrets privilege is not to be "lightly invoked." 345 U.S. at 7. As Judge Learned Hand observed, a claim of the state secrets "privilege will often impose a grievous hardship, for it may deprive parties . . . of power to assert their rights or to

defend themselves. That is a consequence of any evidentiary privilege." *United States v. Coplon,* 185 F.2d 629, 638 (2d Cir. 1950); *see also Northrop Corp.,* 751 F.2d at 399.

Notwithstanding the general rule that neither party may use privileged evidence, this court has allowed limited use to avoid the inequity caused when the United States asserts its privilege at the possible expense of a civilian defendant. Thus, in *Ellsberg,* the court suggested that qualified immunity may protect government officials against liability in this situation. 709 F.2d at 69 & n.74. Here, however, the district court rejected Huddle's claim of qualified immunity, reasoning that "Horn's allegations could constitute a violation of a clearly established constitutional right" and that "a jury could reasonably find clear and convincing evidence of defendants' unconstitutional motive." Mem. Op. of Feb. 10, 1997, at 17-18.[3] This court has also recognized that the excluded evidence may be used for the limited purpose of demonstrating a "valid defense." *In re United States,* 872 F.2d at 476; *accord Molerio v. FBI,* 749 F.2d 815, 825 (D.C. Cir. 1984). In *Molerio,* the court stated:

> As a result of th[e] necessary process, the court knows that the reason Daniel Molerio was not hired had

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[3] Because the defendants in this case lack qualified immunity, our concurring and dissenting colleague suggests that the "'serious injustice' identified in *Ellsberg*" remains. Concurring & Dissenting Op. at 4. To the contrary, in *Ellsberg,* the court concluded:

> In sum, the practicability of *in camera* resolution of the immunity issue *eliminates* the possibility that the defendants - in this case or in future cases - will be trapped by the government's assertion of its state secrets privilege. And that result, in turn, *alleviates any qualms* we might have concerning the result we reach today.

709 F.2d at 70 (emphasis added).

> nothing to do with [his father's] assertion of First Amendment rights. Although there may be enough circumstantial evidence to permit a jury to come to that erroneous conclusion, it would be a mockery of justice for the court - knowing the erroneousness - to participate in this exercise.

749 F.2d at 825. In distinguishing *Ellsberg,* where "the court's consideration of the state secrets privilege did not *ipso facto* disclose to the court the validity of the defense," the court in *Molerio* concluded that "further activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood." *Id.* (italics added).

Therefore, when the district court can determine that the defendant will be deprived of a valid defense based on the privileged materials, it may properly dismiss the complaint. Other circuits have followed suit, relying upon *Molerio* to adopt the "valid defense" standard. *See, e.g., Tenenbaum v. Simonini,* 372 F.3d 776, 777-78 (6th Cir. 2004); *Kasza,* 133 F.3d at 1166 (9th Cir.); *Zuckerbraun,* 935 F.2d at 547 (2d. Cir.); *cf. Bareford,* 973 F.2d at 1141 (5th Cir.). To the extent the Fourth Circuit recently referred to "hypothetical defenses" based on privileged information in *El-Masri,* 479 F.3d at 309, its reference was made in the context of determining whether the "state secrets are so central to [the] proceeding that it cannot be litigated without threatening their disclosure," *id.* at 308, *see* Part III.C, *infra;* as relevant, the court reasoned that any valid defense to El-Masri's allegations of illegal detention and torture would require resort to privileged materials, *id.* at 308. Here, Huddle has already revealed his defense - that he learned of Horn's conversation through Stubbs - and it is unprivileged.

Although the district court found that Horn's complaint must be dismissed because there are possible

defenses that Huddle cannot pursue without the resort to privileged materials, this is quite different from the finding in *Molerio* that the privileged materials showed that the defendant could not have committed the alleged acts. A "valid defense," as contemplated by this circuit's precedents, is meritorious and not merely plausible and would require judgment for the defendant. *See* Black's Law Dictionary 1586 (8th ed. 2004) (defining "valid" as "[l]egally sufficient" and "[m]eritorious"); *see also In re United States,* 872 F.2d at 481-82 (D.H. Ginsburg, J., concurring and dissenting) (agreeing with the court that "there is simply no reason why plaintiff cannot go forward with her claim" because "it is not at all clear that the Government's [secret] defense is dispositive (or even meritorious * * * under New York law)"). "Meritorious," in turn, means "meriting a legal victory," Black's Law Dictionary, *supra,* at 1010.[4]

Under this court's precedent, a claim of state secrets privilege results in "no consequences save those resulting from the loss of the evidence," including "no alteration of pertinent substantive or procedural rules." *Ellsberg,* 709 F.2d at 64.[5] Were the valid-defense exception expanded to

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[4] In other contexts, this court has consistently equated "valid" with meritorious and dispositive. In a criminal case, the court described a "valid defense" as one that "required acquittal." *United States v. DeFries,* 129 F.3d 1293, 1309 (D.C. Cir. 1997) (per curiam). In an exercise of pendent jurisdiction, the court observed that the statute of limitations is a threshold question because if it is a "valid defense," then the court need not reach other defenses. *Rendall-Speranza v. Nassim,* 107 F.3d 913, 916 (D.C. Cir. 1997). Simply put, a "valid defense" in a civil case "prohibits . . . recover[y]." *Graham v. Davis,* 880 F.2d 1414, 1418 (D.C.Cir.1989).

[5] Our concurring and dissenting colleague notes that this portion of *Ellsberg* is dicta and thus not binding on this court. *See* Concurring & Dissenting Op. at 3-4. This citation to *Ellsberg* is limited to principles that the court described as so "well established" and "settled" to have been "taken for granted." 709 F.2d at 64 & nn. 56 & 57 (quoting Mccormick's Handbook of the Law of Evidence, *supra,* at 233)).

mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning the practice of deciding cases on the basis of evidence - the unprivileged evidence and privileged-but-dispositive evidence - in favor of a system of conjecture. Just as "[i]t would be manifestly unfair to permit a presumption of [unconstitutional conduct] to run against" the defendant when the privilege is invoked, *see Halkin I,* 598 F.2d at 10, it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege. There is no support for such a presumption among the other evidentiary privileges because a presumption would invariably shift the burdens of proof, something the courts may not do under the auspices of privilege. *See* 28 U .S.C. § 2072(b).

Our concurring and dissenting colleague would have the court replace this circuit's long-settled precedent, *see, e.g., Molerio,* 749 F.2d at 825; *Ellsberg,* 709 F.2d at 64; *Halkin I,* 598 F.2d at 10, with a broader use of privileged evidence under an approach that considers the "distortion" effects of certain omitted defenses. *See* Concurring & Dissenting Op. at 6-7. Instead of understanding meritorious to mean "meriting a legal victory," our concurring and dissenting colleague seems to liken a meritorious defense to one that is merely potential or colorable. *See* Concurring & Dissenting Op. at 5-8. While suggesting that justice requires the court to withdraw from proceedings even where such defenses become unavailable, our colleague overlooks how this circuit's precedent has accommodated the interests of both plaintiffs and defendants. In suggesting that a defendant's interests require dismissing actions because of

plausible but not demonstrably valid defenses, our colleague ignores how this would abridge the rights of plaintiffs and discounts how the fundamental rights of defendants are protected by dismissing cases when privilege obscures a valid defense that is likely to cause the trier of fact to reach an erroneous conclusion, *In re United States,* 872 F.2d at 476, or upon a legitimate claim of immunity, *Ellsberg,* 709 F.2d at 69. This accommodation is hardly "defendant-adverse." *See* Concurring & Dissenting Op. at 5. Faced with the opposite situation, where a plaintiff has proof of a defendant's liability that is inaccessible because of privilege, the courts are powerless to afford a remedy. And to the extent that our colleague is concerned that federal service will be burdened unless the court intervenes, *see id.* at 6, that concern has already prompted the court to strike an appropriate balance of interests by segregating the unprivileged from the privileged materials so a plaintiff may proceed and by allowing the limited use of privileged materials by the defendant for purposes of claiming immunity or a valid defense. *See Ellsberg,* 709 F.2d at 69.

Nor is it clear that the scales tip as our colleague suggests. The Executive Branch is well positioned to protect the incentives for federal service: it controls both the power to invoke the state secrets privilege and the discretion to indemnify an employee who is found liable for conduct that is taken within the scope of employment. *See* 22 C.F.R. § 21.1; *see also Ellsberg,* 709 F.2d at 69 n.74. Any non-pecuniary costs that may not be susceptible to indemnification are outweighed by the potential costs of a federal service that fails to protect its employees' constitutional rights. It bears remembering that the loss of evidence to the state secrets privilege is to be treated like the loss of evidence when "a witness ha[s] died." *Ellsberg,* 709 F.2d at 64; *accord Am.-Arab Anti-Discrimination Comm. v. Reno,* 70 F.3d 1045, 1070 (9th Cir.1995). The death of a

witness, however, is not an occasion to dismiss complaints on the basis of speculation about what the lost evidence might have suggested. Where the United States has sufficient grounds to invoke the state secrets privilege and decides to invoke it, allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court's caution against precluding review of constitutional claims, *see Webster,* 486 U.S. at 603-04, and against broadly interpreting evidentiary privileges, for "[w]hatever their origins, . . . exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth," *United States v. Nixon,* 418 U.S. 683, 710 (1974).

Consequently, the district court may properly dismiss a complaint because of the unavailability of a defense when the district court determines from appropriately tailored *in camera* review of the privileged record, *Ellsberg,* 709 F.2d at 64; *see Reynolds,* 345 U.S. at 10, that the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier to reach an erroneous result. Because the district court made no finding that the existence of a valid privileged defense for Huddle precluded the continuation of Horn's case, its second ground cannot sustain the dismissal of Horn's complaint.

**C.**

The district court further ruled that "the very subject matter of [Horn's] action is a state secret," therefore requiring dismissal of his complaint. Mem. Op. of July 28, 2004, at 11. In *Reynolds,* the Supreme Court acknowledged that there are cases "where the very subject matter of the action . . . [is] a matter of state secret." 345 U.S. at 11 n.26. The court referred to *Totten v. United States,* 92 U.S. (2 Otto) 105

(1876), where the Court affirmed the dismissal of a lawsuit surrounding a secret contract to perform espionage. In *Tenet v. Doe,* 544 U.S. 1, 8-9 (2005), the Supreme Court clarified that *Totten,* which eliminates actions that "depend[] upon the existence of [a] secret espionage relationship," performs a different function than *Reynolds,* which merely affects the evidence available. The Court explained that *Totten's* core concern is with "preventing the existence of the plaintiff's relationship with the Government from being revealed." *Id.* at 10. Here, once Defendant II is dismissed from the case, the United States does not claim that secret agreements of this sort are implicated.

Horn's case presents no occasion for using the evidentiary privilege to eliminate substantive rights from the outset. In the past, the court has not looked favorably upon broad assertions by the United States that certain subject matters are off-limits for judicial review, *see In re United States,* 872 F.2d at 477, recognizing that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court, . . . is indeed draconian," *id.; cf. Webster,* 486 U.S. at 603-04. In *Reynolds* itself, at the height of the Cold War, the Supreme Court remanded the FTCA case to proceed without the privileged materials. *See* 345 U.S. at 12. Horn's *prima facie* case against Huddle relies, subject to the constraints of the state secrets privilege, upon the cable, the office chatter of Embassy personnel, and a *res ipsa loquitur* inference as to Huddle's source of information about Horn's conversation with Sikorra. *Cf. Barwick v. United States,* 923 F.2d 885, 886-87 (D.C. Cir. 1991). The national security concerns expressed by the Director of Central Intelligence in his unclassified declaration - i.e., revealing identities of covert officers, locations of facilities, organization of classified employees, and intelligence sources, methods and capabilities - are peripheral to what remains of Horn's prima facie case. The United States makes

no claim that Horn has forfeited his constitutional rights by virtue of his overseas assignment with the DEA.

To the extent our concurring and dissenting colleague doubts that Horn's case can be litigated without compromising state secrets, the record does not support the broad statement that "the few unprivileged facts remaining are so entwined with privileged matters, and the risk of disclosure of privileged material so unacceptably high, that the very subject matter of this action is a state secret." Concurring & Dissenting Op. at 11. The declaration of the Director of Central Intelligence rejects the notion that all of Horn's lines of inquiry are inextricably interwoven. Whereas all discussion of intelligence sources, capabilities, and the like must be protected, the Tenet Declaration acknowledges that the remaining material-most notably the redacted cable and the IG interviews with Huddle and Embassy personnel - "can be segregated . . . at no risk to U.S. national security." Tenet Decl. ¶ 33. To dismiss Horn's complaint on the broad grounds favored by our colleague would be to adopt a "heads I win, tails you lose" approach to state secrets: whenever the plaintiff lacks information about his claim, the complaint must be dismissed for failure to make out a *prima facie* case, but as soon as any information is acquired, it becomes too risky to introduce the evidence at trial, also necessitating dismissal. As our discussion reveals, neither the Supreme Court nor this court has adopted such an all-or-nothing approach.

Because the privileged material and the material comprising Horn's *prima facie* case are of a different ilk, our concurring and dissenting colleague's analogy to the law of the Fourth and Fifth Circuits, *see* Concurring & Dissenting Op. at 8-9, is inapposite. In *Bareford,* for example, the complaint alleged that a defense contractor had defectively manufactured and designed a military weapons system, *see*

973 F.2d at 1140. As the Fifth Circuit recognized, any trial would be about the operation and defects of the classified weapons system, which made it facially impossible not to discuss the classified details of the military secrets. *Id.* at 1144. In *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), a claim of libel required the plaintiff to establish that he had not, contrary to a report in *Penthouse* magazine, published classified materials about experiments with dolphins that were used to design torpedoes. Fitzgerald needed to call an expert from the Defense Department in order to establish that the material was not classified. *Id.* at 1242. However, after an invocation of the state secrets privilege, the Fourth Circuit concluded that the case could not proceed because allowing testimony about what was not classified would inevitably allow the inference as to what was classified. *See id.* at 1243. Here, there is no claim that any of the unclassified Embassy gossip borders upon or is suggestive of classified materials - otherwise, it would not have been declassified and disclosed by the United States. By contrast, in *El-Masri* the Fourth Circuit dealt with sensitive details of the United States' program of extraordinary rendition for terrorism suspects and the legality of the very classified program covered by the claim of privilege, *see* 479 F.3d at 310-11. Finally, in *Farnsworth Cannon v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam), the Fourth Circuit upheld the dismissal of a contract case because the claim could not be adjudicated without reference to the organizational structure of a certain Navy component, which was classified.

In an apparent rush to judgment, our concurring and dissenting colleague misstates the position of the court as regards the consequences of state secrets evidence. *See* Concurring & Dissenting Op. at 7-8. If the plaintiff cannot establish a *prima facie* case, then the case must be dismissed. Horn, however, can establish a *prima facie* case without use

of privileged materials. If the defendant proffers a valid defense that the district court verifies upon its review of state secrets evidence, then the case must be dismissed. The district court made no such finding and Huddle has pointed to no such defense on appeal. If the district court determines that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed. But the district court has not yet evaluated the case as it now stands and the Director of Central Intelligence suggests that further proceedings should be possible.

The court does not take lightly the issues of national security that Horn's complaint implicates. But at this juncture, it is premature to use our shared concern about the conduct of future proceedings to justify abandoning all attempts to resolve Horn's remaining substantive dispute. The district court analyzed the danger of proceeding to trial with reference to all of the allegations in Horn's complaint against both defendants. Upon removing Defendant II and the privileged portions of the IG reports and thereby limiting Horn's claims, the information that remains is, according to the Director of Central Intelligence, segregable from the privileged materials such that its disclosure entails "no risk" to national security. Tenet Decl. ¶ 33. Although witnesses in the trial proceedings, including Horn, will likely have had access to some classified materials in the course of their federal employment in addition to the unprivileged materials that form the basis of Horn's remaining claim, there is no basis on this record for a presumption that a witness who has access to classified materials is unable to testify without revealing information that he knows cannot lawfully be disclosed in a public forum. District courts are well-positioned to resolve such concerns, as this court has recognized in emphasizing the obligation to disentangle sensitive information from non-sensitive information. *In re*

*United States,* 872 F.2d at 476 (citing *Ellsberg,* 700 F.2d at 57); *see Reynolds,* 345 U.S. at 11. As such, there is no need to usurp this judgment from the district court as our concurring and dissenting colleague would prefer, *see* Concurring & Dissenting Op. at 11. It remains for the district court on remand to determine what procedures would be required to safeguard against disclosure of privileged materials and then to determine whether Horn's lawsuit can proceed. Were dismissal required based on the allegations now before this court - where Horn relies upon unclassified materials that the United States submits are unrelated to areas of national security sensitivity and Huddle has proffered no privileged valid defense - then federal government employees could unnecessarily be denied an opportunity to enforce their constitutional rights.

Accordingly, we affirm the dismissal of the complaint as to Defendant II but, because the grounds specified by the district court do not warrant dismissal of the complaint as to Huddle, we reverse and remand the case to the district court with instructions to reinstate the complaint against him. Nothing in this opinion forecloses a further opportunity by the United States to establish that privileged evidence demonstrates a valid defense for Huddle. Similarly, nothing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA, 18 U.S.C. app. III, which applies in criminal cases, would be appropriate, as Horn urges, so that his case could proceed. *See, e.g., In re United States,* 872 F.2d at 479-80; *McGehee v. Casey,* 718 F.2d 1137, 1149 (D.C. Cir. 1983); *Ellsberg,* 709 F.2d at 64. We vacate the district court's order dismissing as moot Horn's motion regarding processing his secretaries for security clearance, and we have no occasion to address whether Horn or his counsel have a "need-to-know," *see* Exec. Order No. 13,292, § 61(z), 68 Fed. Reg. 15,315, 15,332 (March 25, 2003), additional classified information.

BROWN, *Circuit Judge*, concurring and dissenting: I agree with the majority that the government properly invoked the state secrets privilege, the privilege applies in a *Bivens* action, and the district court properly dismissed Horn's complaint as to Defendant II.[1] But we disagree about the proper legal standard for determining when application of the privilege requires dismissal. The majority's reversal of the district court's decision pushes this circuit's state secrets jurisprudence in a new and troubling direction - one at odds with all other circuits that have considered the issue. Because, in my view, the district court reached the correct conclusion, I respectfully dissent.

## I.

After the government successfully invoked the state secrets privilege, the district court dismissed Horn's complaint on three independent grounds: (1) because Horn cannot make out a prima facie case absent the privileged material, (2) because the privilege deprives the defendants of information required in their defense, and (3) because "the very subject matter of plaintiff's action is a state secret." Mem. Op. 8. The majority approves the dismissal of Defendant II, but otherwise rejects the district court's conclusions on all three grounds.

As to the district court's first ground – Horn's ability to establish a prima facie case against Huddle absent the privileged material - I generally agree with the legal standard

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[1] The majority also properly assumes without deciding the important question of whether "the Fourth Amendment protects American citizens abroad," Maj. Op. 5, because the question is not squarely presented here. While the district court in an earlier phase of this case did find the Fourth Amendment applicable, the government voluntarily dismissed its appeal of that ruling, and the issue was not litigated or briefed on this appeal.

applied by the majority. But I am less sanguine than the majority that the unprivileged facts actually suffice to make a prima facie showing. Once the privileged material is removed, Horn is essentially left with three pieces of circumstantial evidence - a cable, a table, and Huddle's apparent lie. I question whether a reasonable person would seriously entertain the possibility, based on that evidence alone, that Huddle learned of Horn's statement via a wiretap. One wonders if the atmosphere of government intrigue in this case - an atmosphere carefully cultivated by Horn and unfortunately only exacerbated by the government's invocation of the state secrets privilege - is in fact doing much of the work in the majority's determination that Horn has established a prima facie case on such skimpy evidence. Would a reasonable person really think Horn had established a prima facie case with the same circumstantial evidence if he was an OSHA inspector in Hoboken?

**A.**

But while I remain skeptical that Horn has a prima facie case once the privileged material has been removed, my fundamental disagreement with the majority relates to the controlling legal standard applicable to the district court's second and third grounds for dismissal. The majority does not expressly disagree with the district court's conclusion that, as a result of the invocation of the privilege, Huddle will be deprived of information necessary to mount an effective defense. Instead, relying on *Molerio v. FBI,* 749 F.2d 815 (D.C. Cir. 1984), and dicta from *Ellsberg v. Mitchell,* 709 F.2d 51 (D.C. Cir. 1983), the majority concludes dismissal is inappropriate unless the privileged material contains a defense so " dispositive" as to " require judgment for the defendant." Maj. Op. 17 & n.4.

To be sure, the privileged defense in *Molerio* was

dispositive, and the court dismissed on that basis. But the court in *Molerio* merely determined that a dispositive defense is a *suficient* basis for dismissal, not that a privileged defense *must be* dispositive for dismissal to be appropriate. *See Molerio,* 749 F.2d at 825. Because *Molerio* was the paradigmatic "easy case," it is unhelpful in establishing the proper standard for harder cases presenting less than dispositive, but nonetheless meritorious, defenses.

This is one of those harder cases, and the majority has responded by borrowing *Molerio's* description of an extreme (and therefore easy) case to establish the new baseline for dismissal. In so doing, the majority relies extensively on speculative language from *Ellsberg* about the effect of the state secrets privilege on privileged defenses. *See* Maj. Op. 15-20. Thus, the majority purports to apply "long-settled precedent" in precluding all but dispositive privileged defenses. Maj. Op. 19. But as both the majority and dissent in that case recognized, *Ellsberg's* sweeping comments about privileged defenses were dicta. *See Ellsberg,* 709 F.2d at 64 (noting that in light of its disposition, further discussion was not necessary to resolve the case, but that the court "consider[ed] it prudent to address briefly some of the problems the trial court will confront on remand"); *id.* at 73 (MacKinnon, J., concurring in part and dissenting in part) (characterizing the part of the *Ellsberg* opinion relied on by the majority here as "muddled dicta" presenting "novel procedures" that "I would be very surprised if the court on remand even attempted to apply" in light of a likely alternative resolution of the case); *see also Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

*Ellsberg's* abstract discussion of privileged defenses is only controlling, therefore, to the extent it is persuasive. As the majority in *Ellsberg* itself recognized, the potential for "serious injustice" arises when defenses are compromised by the government's invocation of the state secrets privilege:

> Deprived of the ability in practice to adduce the evidence necessary to mount a defense to the plaintiffs' *prima facie* case, the defendants could be held liable in damages for what in fact was wholly blameless conduct. Such a result not only would be patently inequitable, but might have an unfortunate long-run impact on the recruitment and behavior of government officials.

*Ellsberg*, 709 F.2d at 69 (footnote omitted). The *Ellsberg* majority speculated this "serious injustice" might be ameliorated by "recent developments" in the doctrine of qualified immunity. *Id.* But, as the majority here recognizes, the doctrine of qualified immunity does nothing for Huddle. Maj. Op. 15. We are thus left with the "serious injustice" identified in Ellsberg, without the supposed "way out of th[e] dilemma" envisioned by the Ellsberg majority. *Ellsberg*, 709 F.2d at 69. Dictum lacks binding precedential value precisely because abstract musings often fail to produce fully-considered legal rules. When "we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication . . ., we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided." Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1250 (2006).

Indeed, perhaps recognizing the potential for "serious injustice" identified in *Ellsberg*, no other circuit has adopted

the severe defense standard applied by the majority here. Few state secrets cases have been resolved on the defense prong. How to treat privileged defenses is an exceedingly difficult question, and most cases that have presented defense issues have been dismissed on other grounds. *See, e.g., Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992). But the few circuits to address squarely the issue have not applied the defendant-adverse standard favored by the majority. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 309-10 (4th Cir. 2007) (dismissing in the alternative on the ground that "the defendants could not properly defend themselves without using privileged evidence"); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (dismissing because "Defendants cannot defend their conduct with respect to [the plaintiff] without revealing the privileged information").

By equating a "valid" defense with a "dispositive" defense, and noting that "[o]ther circuits have . . . rel[ied] upon *Molerio* to adopt the 'valid defense' standard," Maj. Op. 16, the majority papers over the novelty of the defense standard it is applying. True, other circuits have referenced the "valid defense" standard, and cited *Molerio* in support, but it is not at all clear that in doing so they interpreted "valid" as meaning "dispositive," as opposed to "valid" as meaning simply "meritorious." *See* Black's Law Dictionary 1586 (8th ed. 2004) (defining "valid" as both "[l]egally sufficient" and "[m]eritorious"). Indeed, the Sixth Circuit in *Tenenbaum* - the only circuit actually to *apply* a "valid defense" standard - apparently meant the latter, since in dismissing the case, it stated only that "Defendants cannot defend their conduct . . . without revealing the privileged information," and made no suggestion that any of the defenses were dispositive. 372 F.3d at 777.[2]

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[2] The majority also cites *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989), for its discussion of the "valid defense" standard. *See* Maj. Op. 16,

The majority's privileged-defense standard is troubling both in its sharp departure from the other circuits and in its potential effect on public officers. If a government officer accused of malfeasance has several meritorious - but not sure-fire - privileged defenses, those defenses are now simply irrelevant.[3]

The majority also completely ignores the potential for distortion when valid defenses are excised by invocation of the privilege. As Judge Phillips noted over a quarter-century ago, it is "important to keep in mind that by its very nature" the state secrets privilege "compromises the intrinsic fairness of the adversary litigation process which has been provided for formal dispute resolution" - for both plaintiffs and defendants alike. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 277 n.2 (4th Cir.) (Phillips, J., specially concurring and dissenting), *maj. op. rev'd per curiam, id.* at 281 (1980)

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19. The court in *In re United States*, however, had no occasion to apply any privileged-defense standard - certainly not the standard advanced by the majority. *See In re United States*, 872 F.2d at 482 (D.H. Ginsburg, J., concurring and dissenting) ("Here it is not at all clear that the Government's secret defense is dispositive (or even meritorious under New York law)." (alterations in original omitted)). In any event, any privileged-defense discussion in *In re United States* is irrelevant; unlike here, the government itself was the defendant in *In re United States*, and, "[i]n *Ellsberg*, this court made clear that a *government* party does not forfeit a meritorious defense merely because it would need to rely on privileged materials in order to assert it." *Id.* at 481 (emphasis added).

[3] The majority further states that "Huddle has already revealed his defense - that he learned of Horn's conversation through Stubbs - and it is unprivileged." Maj. Op. 17. Surely the majority cannot mean to imply that Huddle is limited to only *one* defense. As the majority is aware, the district court in a classified portion of its opinion recounted specific aspects of the privileged material Huddle would require to mount an effective defense at trial. Mem. Op. 11 (redacted). None of that material relates to Horn's disputed conversation with Stubbs.

(en banc). When application of the privilege so "compromises the intrinsic fairness" of a judicial proceeding - whether because it has removed too much information from the plaintiff's case or from the defendant's defense, or, as in this case, both - the right solution is not simply to muddle on, but rather "to withdraw from . . . litigants their normal right of access to the formal dispute resolution forum provided by the sovereign." *Id.* at 279. To permit a grossly distorted case - where the court knows the "facts" being litigated are only a parody of the real facts - to continue in our courts is not justice, and only invites injustice. *See id.* at 279 n.5 ("[Dismissal is appropriate] where the judge can sense that the actual dispute as defined by the issues so far differs from the dispute that could be litigated while honoring the privilege as to draw in question the fairness of attempting to apply to the restricted dispute the legal principles appropriate to resolution of the actual dispute.").[4]

**B.**

By stripping meritorious defenses from Huddle and

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[4] The majority argues that considering the "'distortion' effects of . . . omitted defenses . . . . abridge[s] the rights of plaintiffs," Maj. Op. 19, and "thwart[s] a citizen's efforts to vindicate his or her constitutional rights," *id.* at 20. Of course, that argument begs the very question that divides us: Do plaintiffs have a "right" to use the courts to press a case against a defendant when the available "facts" of that case no longer approximate reality? Ironically, it is the majority's unprecedented privileged-defense standard that creates "a system of conjecture," Maj. Op. 18, where fact-finders are forced to invent the missing parts of the story. The majority's standard, not mine, "impose[s] a presumption." *Id.* I am advocating a case-by-case assessment of how the privilege has affected the shape of the case being presented to the fact-finder, not "dismissal of a complaint for any plausible or colorable defense." *Id.* The majority, in contrast, is effectively establishing a presumption that plaintiffs able to make a prima facie showing deserve to prevail against defendants relying on meritorious privileged defenses, unless those defenses are dispositive.

leaving gaping holes in Horn's prima facie case, the invocation of the privilege so distorts this case that dismissal is necessary. "[T]he undisclosable scope of privilege lies so completely athwart the scope of proof relevant to resolution of the issues presented that litigation constrained by administration of the privilege simply could not afford the essential fairness of opportunity to both parties that is a fundamental assumption of the adversary system." *Id.* at 279. Even assuming, however, that the majority remains indifferent to the distortion caused by the privilege, the district court's third ground for dismissal - that the "very subject matter" of Horn's action is a state secret - should be affirmed. The district court expressed concern that state secrets are "so central to the subject matter of [Horn's case] that any attempt to proceed will threaten disclosure of privileged matters." Mem. Op. 11-12 (quoting *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-42 (4th Cir. 1985)). The majority apparently disagrees, finding "national security concerns . . . peripheral to what remains of Horn's prima facie case." Maj. Op. 22.

In applying the "very subject matter" ground, other circuits have focused on the threat of inadvertent disclosure of privileged material posed by further litigation. *See Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir.1995); *Bareford*, 973 F.2d at 1143; *Farnsworth Cannon*, 635 F.2d at 281 (en banc) (per curiam). Specifically, courts have considered the extent to which the non-privileged facts remaining in the case are intertwined with or surrounded by privileged material. *See, e.g., Bareford*, 973 F.2d at 1143 (noting "the practical reality that in the course of litigation, classified and unclassified information cannot always be separated"); *Fitzgerald*, 776 F.2d at 1243 n.11 (explaining that "the merits of this controversy are inextricably intertwined with privileged matters"). Courts have expressed special concern

where the plaintiff is in possession of some of the privileged material. *See Fitzgerald*, 776 F.2d at 1242 n.8; *Farnsworth Cannon*, 635 F.2d at 281 (en banc) (per curiam). Similarly, they have recognized the risk of accidental disclosure where plaintiffs' cases depend on testimony from witnesses with personal knowledge of classified secrets "relevant to the subject matter of the litigation." *Fitzgerald*, 776 F.2d at 1242; *accord Bareford*, 973 F.2d at 1143-44. Courts have taken a practical approach, looking realistically at the "facts necessary to litigate" a plaintiff's case, "not merely [those necessary] to discuss it in general terms." *El-Masri*, 479 F.3d at 310-11 (collecting cases). As the Fourth Circuit has explained, "[t]he controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets." *Id.* at 308.

This court has had no occasion to apply the "very subject matter" ground. But applying its logic to Horn's complaint leads inexorably to the conclusion reached by the district court. The few remaining unprivileged facts comprising Horn's prima facie case are islands surrounded by a sea of privileged material. This case is no different in that regard than *Farnsworth Cannon*, *Fitzgerald*, *Bareford*, or *El-Masri*, except that here the islands are fewer and smaller.[5]

Moreover, the majority's assertion that Horn "is not in possession of the privileged material" is mystifying. Maj.

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[5] The majority characterizes those cases as "inapposite," noting the centrality of the privileged information to each plaintiff's case. Maj. Op. 23-24. But this case is no different - here, the clearly "sensitive details," Maj. Op. 23, of Huddle's ability to conduct or order a wiretap are plainly central to Horn's case. And the allegations in Horn's complaint necessarily rely on the involvement of Defendant II; thus, dismissing Defendant II does not alter his centrality to Horn's case.

Op. 9. Horn clearly knows some of the privileged material, which the majority elsewhere implicitly concedes when it affirms the district court's dismissal as to Defendant II, noting "there is no unprivileged evidence connecting him to Horn's allegations." *See* Maj. Op. 13. Admittedly, because Horn has never seen the classified portions of the two agency investigative reports, he cannot precisely map the division between what portion of the information he knows is covered by the privilege, and what isn't. But that only exacerbates the potential for inadvertent disclosure, presenting the same problem identified by the Fourth Circuit in *Farnsworth Cannon:*

> [The ex parte] affidavit [delineating the privileged information] has not been seen by [plaintiff's] counsel, and without some disclosure of the affidavit to counsel, the trial lawyers would remain unaware of the scope of exclusion of information determined to be state secrets. Information within the possession of the parties on the periphery of the suppression order would not readily be recognized by counsel, unaware of the specific contents of the affidavit, as being secret or as clearly having been suppressed by the general order of the district court. In an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing.

*Farnsworth Cannon*, 635 F.2d at 281 (en banc) (per curiam).

Likewise, the majority suggests the unavailability of the privileged IG reports is of little consequence to Horn's case, because "there would be no barrier to his calling the [reports'] affiants as witnesses in order to testify to . . .

unclassified matters." Maj. Op. 14. The majority is unconcerned that witnesses with relevant knowledge who might be called to testify are also sure to possess privileged information relevant to Horn's case. Because the demarcation between the privileged and unprivileged information is by no means intuitive and, like Horn, the witnesses themselves would not be privy to the exact scope of the privilege, "the danger that witnesses might divulge some privileged material during [direct and] cross-examination is great." *Bareford,* 973 F.2d at 1144.

All of these considerations support the district courts third ground for dismissal. The majority comments that, at this stage of the proceedings, "Horn need not plead the facts sufficient to prove his allegations and evidence that will ultimately be used at trial." Maj. Op. 14. That is true; however, the government's invocation of the state secrets privilege in this case requires us to frankly consider whether Horn's case "can be *litigated* without threatening the disclosure of . . . state secrets." *El-Masri,* 479 F.3d at 308. Relying on the same case- and fact-specific approach favored by every other circuit that has considered the issue, and based on my review of the entire record *in this case,* I would find the risk of disclosure too great. Here, the few unprivileged facts remaining are so entwined with privileged matters, and the risk of disclosure of privileged material so unacceptably high, that the very subject matter of this action is a state secret.[6]

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[6] The majority characterizes the declaration of the Director of Central Intelligence as "reject[ing] the notion that all of Horn's lines of inquiry are inextricably interwoven." Maj. Op. 22. But the declaration, which in the portion cited explains only that some potentially relevant evidence presents "no risk to U.S. national security" once segregated, says absolutely nothing about whether attempting to *litigate* a specific case involving that evidence might present an unacceptably high risk of disclosure. To state that specific pieces of evidence are unprivileged is obviously not tantamount to stating that any litigation involving that

## II.

This circuit's state secrets cases have predominantly turned on the first of the three grounds relied on by the district court in dismissing Horn's case.[7] The majority's disposition requires it to address all three grounds, but in doing so it gives short shrift to the important issues of distortion and disclosure. In my view, both of these issues are most effectively considered when analyzing whether the "very subject matter" of a case is a state secret. Thus, I would analyze the effect of invocation of the state secrets privilege as follows: First, can the plaintiff establish a prima facie case absent the privileged material? Second, if so, is a dispositive (i.e., *Molerio*-type) defense barred by the invocation of the privilege? Third, is the very subject matter of the case a state secret? In evaluating this final prong, I would consider the issues of distortion and disclosure: Has removal of facts relevant to the plaintiff's prima facie case or the defendant's defense, or both, so distorted the case that the litigation no longer even approximates reality? And does further litigation threaten inadvertent disclosure?

While I find this framework helpful, another might work equally well. The problem with the majority's approach is its elevation of the rhetoric of perfect justice over the realities of distortion and disclosure. The question is not whether we like or approve of the state secrets privilege. It exists. The question is how the existence of the privilege, properly invoked, reshapes the case. In reversing the district

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evidence could never run an unacceptable risk of disclosure of state secrets. The majority's attempt to wrest the latter implication from the declaration far exceeds that document's purpose and scope.

[7] *Molerio* turned on the second ground, but, as noted, *Molerio* was an easy case presenting a clearly determinative privileged defense. *See* 749 F.2d at 825.

court's conclusion that the very subject matter of Horn's case is a state secret, the majority rejects the standard consistently used by other federal courts and fails to offer any alternative.[8] To make matters worse, the majority announces a new and troublingly high threshold for dismissal when invocation of the privilege compromises the defenses of government officials.

I respectfully dissent.

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[8] The majority comments "there is no need to usurp . . . from the district court" the judgment of whether the very subject matter of Horn's case is a state secret. Maj. Op. 25. Yet that is exactly what the majority has done, explaining that "the district court has not yet evaluated the case *as it now stands*." Maj. Op. 24 (emphasis added). But the case "as it now stands" is no different than the case the district court dismissed except the majority has put Huddle back in. In dismissing Horn's entire case, the district court certainly considered whether an action against Huddle alone risked disclosure of state secrets, stating that "[a]t the *heart* of plaintiff's claim is . . . information that is at the center of the state secrets privilege" and that "*any* attempt to proceed will threaten disclosure of privileged matters." Mem. Op. 12 (emphases added) (citation omitted).

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In the

# Supreme Court of the United States

KHALED EL-MASRI,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING PETITIONER

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## INTEREST OF THE AMICUS CURIAE[1]

Amicus The Association of the Bar of the City of New York ("Association") is an independent professional association of more than 22,000 lawyers, judges and legal scholars. Founded in 1870, the Association has long been devoted to promoting and preserving the role of the judiciary in our constitutional system of separation of powers as a check against unconstitutional or unlawful government conduct that violates individual rights. The Association also has been deeply involved in efforts to assure an appropriate balance between the needs of national security and the preservation of civil liberties.

Of special relevance here, the Association has extensively addressed concerns about the government's accelerating practice — accepted by the Fourth Circuit here — of prematurely invoking the state secrets privilege to deny a federal forum to alleged victims of unlawful government conduct purportedly undertaken in the name of national security. The Association has filed amicus curiae briefs addressing its concerns about this procedure in cases in the Sixth and Ninth Circuits and the Eastern District of Michigan and Southern District of New York.[2] The Association also

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] *Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, Nos. 06-2095/05-2140, *opinion at* 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007); *Hepting* v. *AT&T Corp.*, Nos. 17132/17137, *appeal argued* (9th Cir. Aug. 15, 2007); *Ctr. for Constitutional Rights* v. *Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, No. 06-CV-10204, *opinion at* 438 F. Supp. 2d 754 (E.D.

has published a major study about the government abuses that are implicated by the claims that are the subject of Petitioner's suit. *See* The Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (2004)[3].

## SUMMARY OF ARGUMENT

Amicus submits this brief in support of Petitioner and urges the Court to grant certiorari to review the procedure, adopted here by the Fourth Circuit, invoking the state secrets privilege to deny a federal forum for the enforcement of individual rights before undertaking available procedures that might permit the litigation to proceed without disclosing state secrets.

This case concerns the threshold dismissal, on state secrets grounds, of a tort suit alleging that U.S. government officials conspired to violate Petitioner's rights under the Constitution and international law to be protected from abduction, arbitrary detention and inhumane treatment. Without permitting any discovery, or considering any non-privileged evidence, and based solely on two government affidavits (one presented *in camera* and *ex parte*), and speculation about what evidence might be needed to sustain the claims or to make possible defenses, the district court dismissed the case at the pleading stage — and the Fourth Circuit affirmed that dismissal — based on the state secrets privilege.

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Mich. 2006), *rev'd*, Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

[3] *Available at* http://www.chrgj.org/docs/torturebyproxy.pdf.

In this brief, amicus argues that certiorari is warranted to review the procedure adopted by the Fourth Circuit because it does not reflect a proper regard for the judiciary's role in our constitutional system of separation of powers and its capacity to fulfill that role while protecting state secrets. We submit that the rule of law itself — and the basic proposition that no government official is above the law — is at stake here.

Our constitutional system of separation of powers assigns to the courts the task of acting as a check against unconstitutional or unlawful Executive conduct in cases properly brought before them by victims of such conduct. It is for the judiciary to enforce constitutional and other legal limits on Executive power and to fashion effective remedies to vindicate violations of individual rights. And it is a role the judiciary has played throughout our nation's history, even in times of grave threats to national security.

The manner in which the Court of Appeals applied the state secrets privilege here (and as it is repeatedly invoked by the government) threatens to nullify the courts' role as a check against the most grave misconduct by the Executive and effectively immunizes officials of the Central Intelligence Agency ("CIA"), and other intelligence agencies, against claims based on the most egregious violations of individual rights guaranteed by the Constitution, statute or international law. In prematurely invoking the state secrets privilege to deny any judicial forum for claims of serious abuse, the Court of Appeals did not make the obligatory effort to permit the litigation to proceed while protecting legitimate state secrets, thus effectively transforming a common law evidentiary privilege into a rule of non-justiciability.

Petitioner correctly argues that the state secrets privilege should only be invoked in response to specific questions and specific demands for information (as other evidentiary privileges are exercised) and that courts should carefully disaggregate and closely scrutinize each item of evidence for which the privilege is invoked to assess whether it is truly a "state secret" and whether it is needed to sustain a claim or defense. At a bare minimum, courts should not consider the state secrets privilege as a ground for dismissal until all non-privileged discovery has been completed. If privileged information is still needed for the plaintiff's or the government's case, courts should then consider ways of protecting the state secrets short of dismissal. Experience in other areas of the law demonstrates that federal courts can competently handle classified evidence without jeopardizing national security or individual rights. Only in this way can courts properly accommodate the need to protect state secrets with their paramount role as a check on unlawful government conduct.

## ARGUMENT

### I. Certiorari Should Be Granted Because of the Impact the Fourth Circuit's Procedure Would Have on the Judiciary's Role Under our Constitutional System of Separation of Powers and on the Rule of Law

Application of the state secrets privilege denied Mr. El-Masri access to a federal judicial forum for his claims under the Constitution and international law. Such a denial of a forum immunized the Executive from claims that it engaged in the most shocking violations of Mr. El-Masri's individual rights. As we discuss below, acceptance of the procedure adopted by the Fourth Circuit as a sufficient judicial response to invocation of the state secrets privilege

would have effects well beyond this case: It would effectively immunize from judicial scrutiny government abuses in the course of all clandestine activity purportedly undertaken for national security purposes. Such a result would severely undermine the constitutional role of the judiciary and the rule of law.

### A. The Judicial Branch Has Been Assigned the Task of Providing a Check on Unconstitutional or Unlawful Executive Conduct and Enforcing Federally Protected Individual Rights

The Fourth Circuit ignored the tension between its decision and the role of the judiciary under the Constitution. Contrary to its view, the Fourth Circuit was not being asked to employ a "roving writ to ferret out and strike down executive excess." *El-Masri* v. *United States*, 479 F.3d 296, 312 (4th Cir. 2007). Rather, it had before it a "case or controversy" in which the plaintiff claimed he was a victim of unlawful Executive action that inflicted grave injury on him. This is precisely the type of claim that the Founders, in adopting the Constitution, expected the Judicial Branch to adjudicate and, if proven, to provide an appropriate remedy. The judiciary plays this role in times of war and crisis, even when issues of national security have been implicated.

In establishing our constitutional structure, the Founders understood that power ought not to be allowed to concentrate in one branch of government, unchecked.

> Basic to the constitutional structure established by the Framers was their recognition that "[the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may

> justly be pronounced the very definition of tyranny." To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

*N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (quoting The Federalist No. 47, at 300 (James Madison) (H. Lodge ed., 1888)). As a result, the Framers set up a system of checks and balances to serve as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 57-58 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

In our constitutional system, the Judicial Branch has the ultimate role of enforcing the Constitution and remedying abuses of power by either the Executive or Legislative branches. Presenting the Bill of Rights to the Congress, James Madison stated that:

> If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 Annals of Cong. 457 (Joseph Gales ed., 1834). The Framers expected that the judiciary would "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the

influence of particular conjunctures, sometimes disseminate among the people themselves . . . ." The Federalist No. 78, at 440 (Alexander Hamilton) (Isaac Kramnick, ed., 1987).

In carrying out its responsibility to enforce legal rights against Executive abuses, the judiciary necessarily has the power to devise effective remedies. This principle was eloquently enunciated early in our nation's history by Justice Marshall in *Marbury* v. *Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).

Accordingly, this Court has repeatedly underscored federal courts' authority to craft remedies adequate to redress violations of constitutional rights, including damage remedies. *See Davis* v. *Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); *Bell* v. *Hood*, 327

U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citations omitted)). That is, in fact, the rationale for the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As Justice Harlan emphasized in concurring, "the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . ." *Id.* at 407. The judiciary's role in enforcing constitutional rights is so fundamental that serious constitutional issues would be raised were Congress to deny any federal judicial forum for vindication of such rights.[4]

Moreover, the judiciary acts as a check on *all* unlawful conduct by the Executive. This is implicit in the concept that this is a "government of laws, not men" and that no one — including the Executive — is above the law. *See United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the

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[4] *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) ("We [have] emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (citations omitted)); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (arguing that the Constitution requires that "some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation." (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953) and *Hart and Wechsler's The Federal Courts and the Federal System*, 345-57 (5th ed. 2003))).

officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.")[5]; *Nixon* v. *Fitzgerald*, 457 U.S. 731, 781 (1982) (White & Blackmun, JJ., dissenting) ("[I]t is the rule, not the exception, that executive actions — including those taken at the immediate direction of the President — are subject to judicial review . . . . [T]he constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review."). As this Court confirmed in *Clinton* v. *Jones*, 520 U.S. 681 (1997), it has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Id.* at 703.[6]

The judiciary's role in enforcing the Constitution, laws, and treaties of the United States is embodied in Article III of the Constitution and by the congressional enactments conferring jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States" (28 U.S.C. § 1331) and civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States" (Alien Tort Statute, 28 U.S.C. § 1350). In dismissing Mr. El-Masri's claim at the pleading stage, the lower courts refused to perform the role assigned to them by the Constitution and Congress, without any effort to consider or avail themselves of procedures that might have permitted the case to proceed while protecting state secrets.

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[5] The holding of this case, which was based on common law, was subsequently superseded by federal legislation. *See Block* v. *North Dakota*, 461 U.S. 273, 282 (1983).

[6] *See also Sanchez-Llamas* v. *Oregon*, -- U.S. --, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." (citing *Marbury*, 5 U.S. at 177)).

As discussed in Point I.B below, that refusal has grave implications for our constitutional system and the rule of law that go well beyond this case.

### B. Accepting the Fourth Circuit's Procedure for Applying the State Secrets Privilege Would Nullify the Court's Role as a Check on a Broad Category of Unconstitutional or Unlawful Executive Conduct

Since the terrorist attacks of September 11, 2001, the Government has greatly accelerated the invocation of the state secrets privilege as a ground for dismissing at the pleading stage cases involving alleged abuses by the Executive in the course of various clandestine activities purportedly intended to protect national security. Pet'r Br. 13-14. Such an application of the privilege is likely to immunize from judicial scrutiny a broad category of government conduct at a time when there is a special need for judicial protection against government infringements of individual rights.

In its efforts to combat terrorism in the post-9/11 period, the government is alleged to have adopted, and in some respects has acknowledged adopting, a variety of practices that raise the most serious civil liberties and human rights issues. These include secret detentions, the use of torture and other inhumane interrogation methods, kidnapping and sending suspects to countries known to employ such interrogation methods, and warrantless surveillance.[7] Because of the clandestine nature of these

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[7] *See* Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006), *available at* http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf; Eur. Parl. Ass., *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, AS/Jur

activities, the state secrets privilege, if applied in the superficial manner employed by the Fourth Circuit, would routinely shield officials of the CIA and other national security agencies from judicial scrutiny of claims that they have engaged in these or other infringements of individual rights. In such cases, the Government can — and as Petitioner shows, frequently does — invoke the state secrets privilege to assert that clandestine intelligence or enforcement activity is a state secret and that accordingly, nothing pertaining to those activities can be adjudicated without disclosing a state secret. At bottom, this is the reasoning adopted by the Fourth Circuit.

It is precisely in circumstances like those existing today — a time of great concern and fears about terrorism — that the judiciary's role as a check on over-zealous and unlawful Executive conduct is both most needed and most sorely tested. Accordingly, the judiciary's power to enforce the Constitution against unlawful Executive conduct has long been exercised in times of crisis, even when the country was facing grave threats to its national security. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-89 (1952) (enjoining President Truman's seizure of the steel mills as beyond his Executive powers,

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(2007) 36 (2007), *available at* http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; *Arar* v. *Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *appeal docketed* No. 06-4216-cv (2d Cir. Sept. 12, 2006); *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal argued* Nos. 17132/17137 (9th Cir. Aug. 15, 2007); *see also Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, Nos. 06-2095/05-2140, 2007 WL 1952370 (6th Cir. July 6, 2007).

despite the possibility that a threatened strike would cripple our Nation's military power in the middle of the Korean War); *New York Times Co.* v. *United States*, 403 U.S. 713, 722-23 (Douglas, J., concurring), 741-42 (Marshall, J., concurring) (1971) (per curiam) (refusing to enjoin the publication of classified documents concerning the prosecution of the Vietnam War, notwithstanding the government's claims that disclosure of the documents would undermine the war effort and damage national security).

These principles have recently been applied in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, this Court rejected arguments that the prosecution of war justified denying basic due process even to an American citizen captured in hostile combat on a battlefield in Afghanistan. Balancing the competing interests in national security and liberty, the Court cautioned that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532 (citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963); *United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile[.]")).

The Fourth Circuit ignored these teachings and failed to recognize the serious consequences its approach has for our constitutional system and the rule of law. It also failed to consider the ways in which it could accommodate the role assigned to the judiciary under the Constitution and federal statutes without compromising national security. Certiorari is warranted to make clear that such an approach is unacceptable.

## II. Certiorari Should Be Granted To Clarify the Procedures Available To Protect State Secrets While Permitting Adjudication of Claims

It is vital that the methods and procedures used to protect state secrets account for the need to preserve the role of the courts as the guardian of individual rights against Executive abuse. The approach taken by the Fourth Circuit ignores this need and the many tools available to accomplish this task without harming national security.

In dismissing Mr. El-Masri's claims, the Fourth Circuit applied the state secrets privilege based on its speculation, without assessing the actual testimony or evidence sought or needed, that the subject matter of Mr. El-Masri's claims was likely to require disclosure of information adverse to national security. But, as Petitioner persuasively argues, more careful procedures should have been invoked, which might have permitted the litigation to proceed without disclosing state secrets. Pet'r Br. 15-22, 24-27.

First, the state secrets privilege should only be invoked in response to specific questions and specific demands for information. *Id.* at 16-17. This is the approach that has been followed by numerous courts. *Id.* And this is the approach that courts take with respect to other evidentiary privileges with arguably constitutional grounding. *See United States* v. *Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (Fifth Amendment); *United States* v. *Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (Fifth Amendment); *United States* v. *O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980) (executive privilege); *see also Nat'l Lawyers Guild* v. *Attorney General*, 96 F.R.D. 390, 392-93 (S.D.N.Y. 1982) (executive privilege).

Such a procedure would permit the court to examine the specific evidence for which the privilege is invoked and

determine whether it is truly a "state secret." Courts should not be reluctant to make that assessment *in camera*. *See* Pet'r Br. 23-24. The experience of federal courts in handling classified information in criminal prosecutions, including terrorism cases, demonstrates that they are competent to do so. *See* pp. 15-17, *infra*. Experience also shows that the Court's failure to directly examine evidence claimed to involve state secrets can result in mistaken applications of the privilege. This is illustrated by facts discovered years after this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1 (1953), which excluded evidence on state secrets grounds. Subsequent disclosure of the government accident report that the *Reynolds* Court, relying solely on a government affidavit, held to be privileged shows that the report contained no state secret. In fact, it contained an admission of the government's negligence that was the subject of plaintiff's claim. *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*, xi, 113, 181-82 (2006).

At a minimum, this Court should clarify that courts should not consider the state secrets privilege as a ground for dismissal until all non-privileged discovery has been exhausted. Dismissal should be a last resort, not a first. Courts should first be required to assess the non-privileged evidence to determine whether the plaintiff's case and the government's defense can be made without privileged evidence. *See* Pet'r Br. at 17-22. If privileged information is still needed for the plaintiff's or the government's case, courts should then consider ways of protecting the state secrets short of outright dismissal.

Two broad statutes, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, *et seq.*, show ways in which federal courts can craft procedures to handle

classified evidence without resorting to threshold dismissal or any compromise of governmental interests in secrecy. The methods developed under these two statutes can be effectively adapted to deal with evidence assertedly subject to the state secrets privilege.

CIPA supplies procedural tools to maximize the evidence available in the pre-discovery, discovery and trial phases of federal criminal cases, to mitigate tensions between fairness and security.

First, prior to discovery, CIPA § 3 provides the court with the flexibility to craft protective orders governing the production and handling of evidence to establish conditions for the secure handling of classified information. *See United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 116 (S.D.N.Y. 1999) ("[P]ursuant to Section 3 of the Classified Information Procedures Act . . . the Court has the authority to 'issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.'"); *see also United States* v. *Poindexter*, No. 88-0080, 1988 WL 148597, *1 (D.D.C. Apr. 15, 1988) (granting government's motion for a protective order). In developing protective orders, courts can require defense counsel and the defense team to obtain security clearance to permit them at least to participate in discussions about what might be discoverable. *See* Serrin Turner & Stephen J. Schulhofer, *The Secrecy Problem In Terrorism Trials* 26 (2005),[8] as well as the appointment of Court Security Officer(s) to advise parties on the handling of classified materials. *See also Reliance Ins. Co.* v. *Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (using protective order procedure in a civil

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[8] *Available at* http://www.brennancenter.org/dynamic/subpages/download_file_34654.pdf

case). By distinguishing classified material that security-cleared counsel can handle from the narrower category of state secrets, courts can promote effective narrowing of the evidentiary issues in a case.

Second, in discovery, courts applying CIPA have developed procedures allowing the government to delete information from classified documents presented to the defense or to furnish substitutions for the classified information in the form of summaries or admissions. *See, e.g.*, *United States* v. *Libby*, 429 F. Supp. 2d 18, 26 (D.D.C. 2006). These forms of securely handling classified evidence can be adopted beyond their initial applications. *See, e.g.*, *United States* v. *Yunis*, 867 F.2d 617, 624-25 (D.C. Cir. 1989) (Court of Appeals adopted CIPA-like procedures promulgated for district courts to examine *ex parte* and *in camera* evidence relevant to an appeal). Balancing governmental security interests with the defense's need to access information relevant to their case, CIPA allows the government to request the redaction, substitution, or summary of discoverable information via an *ex parte* written statement to the court.

Third, CIPA facilitates closely regulated use of classified information in the trial phase by requiring that the defense notify the court and the government of any classified information that it "reasonably expects to disclose or to cause the disclosure of" in trial. CIPA § 5. Courts use flexibility in determining the precise kind of notice required, *see, e.g.*, *United States* v. *Bin Laden*, No. S(7) 98 CR. 1023 (LBS), 2001 WL 66393, *6 (S.D.N.Y. Jan. 25, 2001), and the government then may request an *in camera* pretrial hearing for rulings on the relevancy of each piece of classified information. *See* CIPA § 6. "[W]here the judge finds classified information to be relevant, CIPA permits the information to be replaced with an unclassified 'substitute'"

for use at trial, Turner & Schulhofer, *supra*, at 20, provided that the alternative affords "the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6.

In enacting CIPA, therefore, "Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems." *Libby*, 429 F. Supp. 2d at 22 (citation omitted); *accord United States* v. *Rewald*, 889 F.2d 836, 847 (9th Cir. 1989). Experience in criminal cases with CIPA strongly suggests that courts facing claims of state secret privilege in civil cases can fashion protective orders employing similarly effective procedures to avoid dismissal of claims of government misconduct while protecting such secrets.[9]

FOIA also provides tools that can be adapted to cases involving state secrets. The Court of Appeals for the D.C. Circuit has developed ways to carry out Congress's mandate

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[9] A majority of cases in which courts have dismissed claims at the pleadings stage based on the state secrets privilege did not implicate constitutional rights or significant questions of executive wrongdoing. *See Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356 (Fed. Cir. 2001) (breach of contract action); *DTM Research, LLC* v. *AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (trade secrets claims); *Kasza* v. *Browner*, 133 F.3d 1159, 1162-63 (9th Cir. 1998) (dismissing claims regarding reporting and inventory requirements at a classified Air Force location); *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1142-44 (5th Cir. 1992) (dismissing a negligence claim against the government that implicated classified information about a weapons system); *Zuckerbaum* v. *General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d. Cir. 1991) (same); *Fitzgerald* v. *Penthouse Int'l*, 776 F.2d 1236, 1242-44 (4th Cir. 1985) (dismissing a libel suit that involved the unauthorized disclosure of a top secret marine mammal weapons system). Amicus takes no position on whether a different rule would apply in these cases, which do not present the same separation of powers concerns.

in FOIA, for example an indexing procedure that "has proved useful, forcing agencies to review each withheld document and specifically justify withholding." Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 172 (2006); *see generally Vaughn* v. *Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973). The resulting procedure — known as a *Vaughn* index — is suggestive of how secrecy claims can be addressed in fine-grained ways.

Under *Vaughn*, the government must provide "a relatively detailed analysis in manageable segments" of information it contends is exempted from FOIA release "by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document." *Id.* at 827; *see also* S. Rep. No. 93-854, at 167 (1974) (approving the use of the *Vaughn* Index in situations calling for *in camera* inspection of withheld materials). By providing an index "specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding," counsel for both parties could narrow the scope of the court's inquiry to only those elements which were disputed. *King* v. *United States Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). Use of the *Vaughn* Index assures that the claim of secrecy will be limited to discrete pieces of information clearly falling within FOIA's enumerated exemptions to disclosure, enabling the court to perform its role of adjudicating claims whenever possible. It thus enables precisely the kind of narrowing and

accommodation that the Fourth Circuit improperly eschewed in this case.[10]

* * *

These procedures — rather than outright dismissal at the pleading stage — appropriately allow courts to fulfill their judicial duty of protecting individual rights in the face of Executive abuse and to provide a forum for individuals to seek judicial remedies. *See Halkin* v. *Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (invocation of the state secrets privilege "must be carefully considered to assure that the proper balance is struck between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding of the national security."). The rule of law demands no less than the greatest possible exertion by the federal courts to ensure not only the protection of state secrets but also the vindication of individual liberties.

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[10] A good example of the careful procedures that can be employed to avoid unnecessary, premature dismissal of cases seeking to enforce fundamental individual rights is the D.C. Circuit's recent decision in *In re Sealed Case*, No. 04-5313, 2007 WL 2067029 (D.C. Cir. July 20, 2007) *deadline for en banc motion set* (D.C. Cir. Aug. 9, 2007). The Court of Appeals, reversing and remanding a dismissal of a *Bivens* suit seeking enforcement of Fourth Amendment rights first reviewed the nonprivileged information to establish that a prima facie case could be made out on the basis of non-privileged information; it then directed the district court to evaluate *in camera* the privileged information the government claimed was necessary to its defense to determine if in fact that evidence supported a valid defense; and before accepting the assertion that the case was one where "the very subject matter of the case" would require the disclosure of state secrets, directed the district court to carefully disentangle the privileged information from the nonprivileged information and to consider whether CIPA procedures could be used to protect any state secrets without dismissing the case. *Id.* at *12.

## CONCLUSION

The Court should grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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# In the Supreme Court of the United States

KHALED EL-MASRI,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is an independent think tank that seeks to forge bipartisan solutions to pressing constitutional issues. To that end, the Project brings together policy experts, legal scholars, and former government officials and judges from across the political spectrum to issue and promote consensus recommendations for policy reform. Two such blue-ribbon coalitions are the Liberty and Security Committee, created to address the importance of protecting civil liberties as we confront the threat of terrorism, and the Coalition to Defend Checks and Balances, a group of prominent Americans brought together by a deep concern about the risk of permanent and unchecked presidential power and by a desire to see both Congress and the Judiciary exercise their responsibilities as separate and independent branches of government.

On May 31, 2007, members of the Liberty and Security Committee and the Coalition to Defend Checks and Balances issued a detailed statement entitled *Reforming the State Secrets Privilege*, *available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf (last visited August 30, 2007). (Signatories to the statement are listed in the appendix to this brief.) The report examines the "state secrets privilege" and expresses concern at the increasing frequency with which the privilege has been asserted and expanded in recent years. In particular, lower courts—including the Fourth Circuit in this case—have

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

broadened the privilege so that, rather than simply protecting particular pieces of sensitive evidence from public disclosure, it now operates to shield the Government from accountability for what may be grave violations of the Constitution, laws, and treaties of the United States. The bipartisan group of distinguished professionals who endorsed the Constitution Project's statement on reforming the state secrets privilege believe that this situation is intolerable and requires this Court's intervention.

## SUMMARY OF ARGUMENT

The present case offers the Court a much-needed opportunity to clarify the proper scope and application of the state secrets privilege, an issue of overriding national importance that has been left entirely to the lower courts for over half a century. The allegations made by Khaled El-Masri are extremely disturbing: An innocent man, held by American agents for months, drugged, beaten, and tortured in violation of U.S. laws and treaties, was then unceremoniously dumped in a foreign country after the Government realized its mistake. The reception that El-Masri's claims for legal redress received in the courts below is equally disturbing. Invoking a privilege that this Court has recognized as a means of protecting particular pieces of evidence from disclosure, the court of appeals ruled that El-Masri's claims could not be adjudicated at all. And it did so at the pleading stage, before El-Masri had sought discovery of a single piece of evidence—thus giving him no opportunity to develop his claims without using material determined to be privileged.

This expansive understanding of executive immunity goes beyond anything this Court has endorsed. This Court's two main precedents in this arena are *Totten* v. *United States*, 92 U.S. 105 (1875), and *United States* v. *Reynolds*, 345 U.S. 1 (1953). In *Totten*, the Court held that a narrow category of claims—those brought to enforce clandestine employment contracts between the Government and its secret agents—are

non-justiciable. And in *Reynolds*, the Court allowed the Executive Branch, in certain circumstances, the benefit of an evidentiary privilege aimed at protecting particular pieces of classified information when disclosure would jeopardize national security.

This case falls within neither of these paradigms. Instead, in the name of protecting "state secrets," the Fourth Circuit's decision radically expands the *Totten* rule of non-justiciability, wrenching it from its roots in the law of contracts and turning it loose on whole new categories of cases. In recent years, the Government has with increasing frequency and success argued for this expansion, in part to avoid accountability for what may be egregious violations of law. The ruling below would do just that, shielding the Executive Branch from virtually any litigation challenging activities that it claims are secret—even when those activities have garnered front page attention, target U.S. citizens on American soil, or run contrary to the commands of the Constitution or of Congress. This ill-considered and hugely consequential extension of *Totten* and *Reynolds* threatens to undermine the rule of law, our system of checks and balances, and judicial independence. In a constitutional democracy, national security can and must be protected without taking the drastic step of declaring that any case challenging the Executive for what it does in the name of protecting the Nation from its enemies is beyond the judicial ken.

Indeed, in a series of decisions over the past three years, this Court has squarely rejected the argument that the Constitution gives the President free rein to respond to the threat of terrorism without fear of judicial scrutiny. These cases have made clear that the courts, acting within their proper constitutional sphere, can hold the Executive to account for actions taken to combat terrorism at home and abroad. The Fourth Circuit's decision in this case lost sight of this crucial aspect of our constitutional structure. Certiorari is warranted to undo

that damage by confirming the limited reach of the *Totten* bar and by reaffirming that the state secrets privilege acknowledged in *Reynolds* may properly be applied *only* to specific requests for concrete evidence.

Certiorari also should be granted to revisit *Reynolds*' dubious suggestion that state secrets privilege disputes can be resolved without necessarily conducting *in camera* inspection of the evidence at issue. As the disturbing post-decision history of that case confirms, applying the privilege without first subjecting the Government's claims to meaningful judicial scrutiny provides an all-too tempting invitation to Executive abuse. And developments in judicial procedure since 1953 have shown that courts are capable of protecting classified information, exposing the contrary fears expressed in *Reynolds* as anachronistic and dangerous. Only this Court can restore the appropriate balance between the Executive and the Judiciary that was undermined by this Court's decision in *Reynolds*, half a century ago.

## ARGUMENT

### I. Review Is Warranted Because This Court's Cases Do Not Support The Broad And Dangerous Non-Justicability Rule Endorsed By The Fourth Circuit.

The Fourth Circuit's decision to dismiss El Masri's case on the pleadings represents an expansion of executive immunity from civil litigation that this Court has never endorsed, either expressly or implicitly. Instead, this Court's cases establish two, limited, propositions. First, the narrow set of claims that seek enforcement of a secret employment contract between the Government and its clandestine agents are non-justiciable. See *Tenet* v. *Doe*, 544 U.S. 1 (2005); *Totten* v. *United States*, 92 U.S. 105 (1875). Second, provided it complies with various procedural requirements, the Government, in civil cases, may assert an evidentiary privilege to prevent the production of tangible information whose disclosure would threaten national security. See *United States* v. *Rey-*

*nolds*, 345 U.S. 1 (1953). The privilege recognized in *Reynolds* is at once broader and more limited than the *Totten* rule: *Totten* describes a "unique and categorical" nonjusticiability doctrine designed to "preclude judicial inquiry" into "secret espionage relationships" between the Government and its agents. *Tenet*, 544 U.S. at 6 n.4, 7. In contrast, *Reynolds* applies to a larger category of cases—those involving evidence that would expose "military and state secrets," 345 U.S. at 7—but it offers the Government far less, a privilege from having to disclose such evidence rather than a categorical exemption from any judicial scrutiny, *id.* at 11.

Properly understood, neither doctrine applies to this case. Because El-Masri's claims do not involve any clandestine employment contract that he made with the United States, his case simply does not fall into the category of cases "where success depends on the existence of [the plaintiff's] secret espionage relationship with the Government" that *Totten* and *Tenet* forbid. *Tenet*, 544 U.S. at 8. Nor has El-Masri, at least at the present stages of the litigation, sought to discover any classified information that might properly be shielded by the state secrets privilege recognized in *Reynolds*. That case involved a concrete dispute over a concrete document. The Court ruled that the plaintiffs had no right to obtain and use that document to prove their claims, but recognized that they should have an opportunity to "adduce the essential facts * * * without resort to material touching upon military secrets." *Reynolds*, 345 U.S. at 11. Without knowing what particular evidence El-Masri needs to adduce the essential facts supporting his claims, the court below could not even begin to determine, as required by *Reynolds*, whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10.

Instead, what the Government has sought, and what the Fourth Circuit's decision represents, is a significant and dis-

turbing expansion of the *Totten* rule of non-justiciability in the guise of an application of the state secrets privilege.[2] The decision below stretches the *Totten* bar to cover not merely suits to enforce clandestine employment contracts, but virtually any case challenging activities that the Government claims are secret. Pet. App. 35a. Such a radical expansion, which would effectively immunize a wide swath of Executive misconduct from judicial review, is not supported by this Court's precedent.

First, the Court's rationale for barring the adjudication of espionage-contract cases does not apply here. In explaining its decision, *Totten* emphasized the mutual understanding between the Government and the spy attempting to bring suit:

> Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. *This condition of the engagement was implied from the nature of the employment*, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties.

92 U.S. at 106 (emphasis added).

As this passage makes clear, the *Totten* rule is grounded in principles unique to the law of contracts. The decision rests on the premise that a categorical prohibition on litigation over the substance of a secret employment relationship is an implied condition of the contract. See 92 U.S. at 107 ("The secrecy which such contracts impose precludes any ac-

[2] The Fourth Circuit is not the only lower court to have improperly invoked the state secrets privilege as a sweeping jurisdictional bar rather than a limited evidentiary privilege. See also, *e.g.*, *ACLU* v. *Nat'l Sec. Agency*, 2007 WL 1952370 (6th Cir. July 6, 2007); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Zuckerbraun* v. *Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

tion for their enforcement."). That makes sense. The plaintiff in such a case knew (or should have known) what he was bargaining for and, by agreeing to become a spy, voluntarily assumed the risk that he would not be able to resort to litigation if the Government failed to live up to its end of the bargain. Moreover, contract law supported the result in *Totten* in another way: The Court suggested that because the spy agreed, at least implicitly, not to reveal the nature of his employment, the act of bringing the suit *itself* amounts "to a breach of a contract of that kind, and thus defeats a recovery." *Ibid.*

The crucial element of consent is entirely absent in El-Masri's case. Far from entering a *voluntary* contractual relationship with the Government and its private contractors, El-Masri was subjected to a highly *involuntary* regime of detention, coercive interrogation, and abuse. It is impossible to assert that El-Masri consented in any way to a bar on his right to pursue his legal claims, or that the mere filing of those claims itself defeats his right to recover on the merits. The principles that supported the result in *Totten*, and that made it fair and equitable to turn that litigant out of court, do not apply here.

Second, this Court has twice confirmed the narrow scope of the *Totten* rule since it was first announced. In *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court held that the National Security Act did not preclude judicial review of the constitutional claims made by an *acknowledged*, although anonymous, CIA electronics technician for alleged discrimination. *Id.* at 594; see also *Tenet*, 544 U.S. at 10. Because the CIA acknowledged that the plaintiff was an employee, his suit did not implicate the core concern of *Totten*, the disclosure of the plaintiff's covert agreement with the Government.[3] There-

[3] For that same reason, federal courts regularly entertain Title VII claims concerning the hiring and promotion of CIA employees. *Tenet*, 544 U.S. at 10.

fore, the case was justiciable. More recently, the Court in *Tenet* observed that the *Totten* bar is "unique and categorical," 544 U.S. at 6 n.4, and reaffirmed that it applies *only* in "the distinct class of cases that depend upon clandestine spy relationships." *Id.* at 10. That case, involving two former spies who brought suit against the Government to enforce a secret espionage agreement, fell squarely into that circumscribed category and was therefore barred.

Finally, the Fourth Circuit ignored the "serious constitutional question" raised by its expansion of *Totten*, a move that works "to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). To prevent the courthouse doors from being closed to deserving plaintiffs, there is a strong presumption that jurisdictional statutes do not preclude judicial review of constitutional claims, a presumption that can be overcome only where Congress's intent to strip jurisdiction is extremely clear. See, *e.g.*, *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993); *Johnson* v. *Robinson*, 415 U.S. 361, 373–374 (1974). If a presumption in favor of adjudicating constitutional claims applies to statutes passed by Congress, then *a fortiori* that presumption must apply to jurisdictional rules created by judges. Although the *Totten* bar, within its defined sphere of operation, can preclude the adjudication of constitutional claims, see *Tenet*, 544 U.S. at 8, precisely for that reason the doctrine must be narrowly confined. The court of appeals ran roughshod over this important principle.

For these reasons, a decision significantly broadening *Totten* to bar virtually all suits challenging government activities done secretly in the name of national security—no matter how egregious the alleged conduct and no matter that it may already be public knowledge—is momentous. It goes beyond anything this Court has previously recognized and, as explained in the next section, is fraught with peril for our sys-

tem of constitutional constraints on government power. The consequences of such an expansion unquestionably warrant a grant of certiorari.

## II. The Fourth Circuit's Broad Expansion Of *Totten* Is Inconsistent With The Judiciary's Historic Role And Would Have Profound Consequences For Our System Of Checks And Balances.

The ill-considered extension of the *Totten* bar not only harms individual plaintiffs like El-Masri by denying them any recourse to the courts, but has far broader and more systemic consequences. In order to prevent the accumulation of power and to ensure that the conduct of the three branches of government will be constrained by law, the Constitution authorizes each branch to act as a check on the others. As Madison explained, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, * * * may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (1788) (James Madison) (Clinton Rossiter ed. 1961). The Fourth Circuit's decision in this case, and other lower court decisions like it, upset this careful constitutional balance.

Integral to the system of checks and balances envisioned by the Framers is the ability of the Judiciary to decide, when presented with a genuine "Case" or "Controversy," U.S. CONST. art. III, whether the other branches have acted outside their constitutional or statutory authority. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."). By refusing to evaluate the outrageous government conduct alleged by El-Masri against the requirements of the Constitution, statutes, and treaties of the United

States, the Fourth Circuit abdicated its duty to "say what the law is" and gave the Executive Branch *carte blanche* to decide the limits of its own power.

This analysis is no different because this case implicates the President's war powers. To the contrary, it is well settled that the limits on presidential authority, and the Judiciary's obligation to enforce those limits, do not waiver in times of war. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) ("[A] state of war is not a blank check for the President."); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120–121 (1866) ("The Constitution of the United States is a law for rulers and people, equally in times of war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."). The President is "Commander in Chief of the Army and Navy," U.S. CONST. art. II, § 2, but the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. Thus, although the Executive Branch has considerable power to defend the Nation against threats from abroad, that power does not divest the courts of their independent responsibility to determine whether that power is being exercised consistent with the law. As this Court has made clear, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932).[4]

Illustrating its historic refusal to abdicate the judicial function in the face of expansive assertions of executive

[4] That is why, although the Court has given due deference to the Executive in matters of national security and foreign affairs, see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 229-30 (1942), it has firmly rejected the Government's argument "that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." *Hamdi*, 542 U.S. at 535; see also *Sterling*, 287 U.S. at 400–401. Deference must not be confused with abdication.

power, this Court has in three separate cases in the past three years rejected the President's argument that his power over military and foreign affairs precludes the courts from entertaining claims brought by individuals (both citizens and noncitizens) detained by the Government in its efforts to combat terrorism. See *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (holding that the Court had jurisdiction to hear a pretrial challenge to the authority of a military commission and that the commission, as constituted, was unlawful); *Rasul* v. *Bush*, 542 U.S. 466 (2004) (holding that the habeas statute confers a right to judicial review of the legality of executive detention of aliens at Guantanamo Bay); *Hamdi*, 542 U.S. 507 (holding that a U.S. citizen is entitled to a meaningful opportunity to challenge, before an independent tribunal, his detention as an enemy combatant). Those cases all involved highly sensitive issues of national security, yet this Court was able to decide them without "sorely hamper[ing] the President's ability to confront and defeat a new and deadly enemy," or to "prevent future attacks of the grievous sort that we have already suffered." *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (internal quotation marks omitted).

The separation of powers analysis that compelled the Court in *Hamdi*, *Rasul*, and *Hamdan* to reject the Executive's broad assertions that it must be given the power to fight against terrorism free from judicial interference applies with equal force in this case. Here, the Executive asserts not merely that the Judiciary cannot interfere with its fight against terrorism, but goes further to contend that the courts *cannot even know* what it is doing in the name of national defense—even where the issue arises in a concrete legal case involving serious claims that the President's agents have violated the Constitution he is sworn to "defend," U.S. CONST. art. II, § 1, and the laws he is charged to "faithfully execute," *id.* art. II, § 3. On that basis, the Executive argues, and the Fourth Circuit agreed, that a court must dismiss any case that the Government claims implicates secret national security

matters. And the courts are to do so without inquiring into any facts alleged—even those that are already public knowledge—or any of the legal arguments made.

This expansive vision of executive immunity from the ordinary judicial process profoundly disrupts our system of checks and balances and poses an acute danger to individual liberties. Such "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring). Indeed, the Fourth Circuit's ruling aggrandizes the Executive Branch not merely at the expense of the Judiciary, but at that of the Legislative Branch as well. Expanding the *Totten* bar rends a significant hole in the jurisdiction of the federal courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Importantly, that is a hole that Congress, which "decides what cases the federal courts have jurisdiction to consider" and "when, and under what conditions, federal courts can hear them," has not seen fit to recognize. *Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007). By declaring non-justiciable any case that the Government claims implicates secret national security matters, the Fourth Circuit effectively rubber-stamped the Executive's attempt to usurp Congress's constitutional power to determine what cases the federal courts may hear. See generally Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007).

Moreover, the Fourth Circuit's broad interpretation of the state secrets privilege is not limited to activities undertaken by the Executive Branch abroad and directed at foreign nationals. To the contrary, the court's reasoning would equally immunize operations targeting U.S. citizens at home.[5] Under the Fourth Circuit's decision, for example,

[5] This worry is not hypothetical, as any number of citizens whose claims have been dismissed based on lower courts' expansive view of the privi-

CIA operatives could kidnap innocent Americans from their homes and torture or even murder them, and, so long as the Executive maintained that the operation was classified, those citizens or their heirs would have no opportunity for judicial redress whatsoever. This ruling thus gives the Government license to trammel on the most fundamental constitutional and statutory rights of citizens and non-citizens, at home and abroad, without fear of being called to account in any judicial forum.

The court of appeals tried to defend this disturbing result by asserting that, in the end, El-Masri's "personal interest in pursuing his civil claim is subordinated to the collective interest in national security." Pet. App. 50a. Such reasoning overlooks not merely the fact that El-Masri's personal interests—in remaining free from torture and arbitrary detention—have *already* been subordinated to the collective interest in national security. It also neglects the vitally important "collective interest" that El-Masri's suit would vindicate: the interest in ensuring that actions taken in the name of the United States comply with the Constitution and with the laws duly enacted by the People's representatives in Congress. Making certain that the Executive Branch acts within the bound of the law is not some special interest in which only El-Masri has a stake.

The Fourth Circuit's reasoning also ignores the collective interest in government transparency. Secrecy, after all,

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lege can attest. See, *e.g.*, *ACLU* v. *Nat'l Sec. Agency*, 2007 WL 1952370 (dismissing challenge to the National Security Agency's domestic wiretapping program); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing citizen suit seeking to compel the Air Force's compliance with hazardous waste reporting and inventory requirements); *Black*, 62 F.3d at 1118–1120 (dismissing plaintiff's claims against CIA and FBI for assault, battery, and intentional infliction of emotional distress); *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978) (dismissing case brought by Vietnam War protesters challenging surveillance by NSA).

can be as dangerous to a democratic society as disclosure. The newly released CIA "Family Jewels" report illustrates that the worst abuses of government occur in the dark. The report, made public in response to a Freedom of Information Act request, catalogs a long list of CIA misdeeds from the 1950s through the 1970s: domestic wiretapping, failed assassination plots, mind-control experiments, and surveillance of journalists and anti-Vietnam War protestors.[6] As this long list of misdeeds committed in the name of national security reveals, there is a powerful "collective interest" on El-Masri's side of this case, for just as secrecy can be fatal to democracy, openness is often the antidote. Because societal interests are implicated no matter how a case such as this one is resolved, the Fourth Circuit's hasty dismissal—and its unwillingness to consider any alternatives to an outright bar on El Masri's suit—cannot be justified merely by purporting to elevate the Nation over the individual.

## III. This Court Should Reexamine *Reynolds* In Light Of What Is Now Known About The Government's Brazen Abuse Of The State Secrets Privilege In That Case.

As discussed above, this Court should, at a minimum, grant certiorari to confirm that the *Totten* rule is limited to cases involving the enforcement of covert espionage agreements and to reject its expansion to the much larger category of cases in which the Government claims that sensitive evidence will be necessary to adjudicate the plaintiff's claims. But the Constitution Project urges the Court to go one step further and use this opportunity to revisit *Reynolds* itself, and

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[6] See Memorandum from Howard J. Osborn, Director of Security, to the James R. Schlesinger, CIA Director (May 16, 1973), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/family_jewels_full_ocr.pdf (last visited August 30, 2007); *see also* Karen DeYoung & Walter Pincus, *CIA Releases Files on Past Misdeeds*, WASH. POST, June 27, 2007, at A1.

in particular that case's suggestion that, in certain circumstances, judges should not even conduct an *in camera* inspection of evidence claimed to be state secrets. Reexamination of that issue is warranted because this Court's willingness to uphold a state secrets privilege claim without any judicial examination of the allegedly privileged material provides a dangerous incentive for the Government to use the state secrets privilege in bad faith to avoid embarrassment and conceal illegality, rather than to protect national security. The remarkable circumstances surrounding *Reynolds* itself prove that this risk is in no way hypothetical.

Throughout the *Reynolds* litigation, the Government fought tooth and nail to shield an official report by the Air Force concerning the crash of a B-29 aircraft. 345 U.S. at 3. When the widows of three civilian engineers killed in the crash brought suit against the United States and requested the accident report, the Secretary of the Air Force filed a formal "Claim of Privilege" objecting to disclosure. The Secretary asserted that the aircraft had gone aloft on a highly secret mission to test classified electronic equipment. *Id.* at 4. After the district court and the Third Circuit rejected this privilege claim and ordered the report disclosed to the trial judge *in camera*, the Government pressed on, arguing to this Court that the matter implicated the gravest national security concerns. Ultimately, this Court was persuaded and thus granted the Government's request to refuse disclosure of the report even to the Justices themselves. *Id.* at 11. It did so without ever looking at the document in question, suggesting that the court "should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

Thus it was that for more than 50 years the Government's account of the sensitivity of the accident report went unquestioned. In 1996, however, the Air Force at last declassified that report and, in 2000, Judith Loether, the daughter of

one of the civilians killed in the crash, discovered the document on the Internet. See Louis Fisher, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166 (2006). It was immediately obvious that the report, which the Government had so steadfastly insisted contained classified information, did nothing of the sort. There was no mention of the B-29's secret mission or of any secret equipment on board. *Id.* at 167–169. Instead, what the report did reveal is that the crash was the result of the Air Force's negligence, plain and simple. Thus, it seems that the reason the Government fought all the way to this Court to avoid disclosing the report—and deceived several courts about its contents—was *not* to protect national security. The real reason was that disclosure would have embarrassed the Air Force and allowed the widows to win their case. Had this Court merely inspected the challenged evidence *in camera*, the Government's mischief would have been exposed and could readily have been corrected.[7]

As egregious as the circumstances of *Reynolds* are, they unfortunately do not represent an isolated incident. Indeed, all evidence suggests that improper classification is rampant. Executive officials have estimated that somewhere between fifty percent (Carol A. Haave, Deputy Undersecretary of Defense for Counterintelligence and Security) and ninety percent (Rodney B. McDaniel, executive secretary of the National Security Council under President Reagan) of documents ostensibly classified for national security purposes should never have been so classified. See *Emerging Threats:*

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[7] In 2002, Judy Loether and other descendants of the civilians killed in the crash petitioned this Court for a writ of *coram nobis*, asserting that the Court should review and correct its judgment because it was based on an error of fact. This Court denied the petition. Fisher, *supra*, at 188. In 2003, the plaintiffs went back to the district court for relief from judgment in order to remedy fraud on the court. The district court refused and the Third Circuit affirmed, citing the interest in judicial finality. See *Herring* v. *United States*, 424 F.3d 384 (3d Cir. 2005).

*Overclassification and Psuedo-classification: Hearing Before the Subcommittee on National Security, Emergency Threats and International Relations of the H. Committee on Government Reform*, 109th Cong. 115 (Mar. 2, 2005) (prepared statement of Thomas Blanton, Executive Director, National Security Archive) [hereinafter *Testimony of Thomas Blanton*], *available at* http://www.access.gpo.gov/congress/house/pdf/109hrg/20922.pdf (last visited August 30, 2007).[8]

The Executive's tendency to overclassify has only increased during the current administration,[9] which has promulgated secret laws[10] and even secret legal theories.[11] Indeed,

[8] See also *id.* at 121 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.") (emphasis omitted) (quoting Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25); see also William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101-02, 109 (2005).

[9] For example, former Attorney General Janet Reno authorized withholding of information under a request based on the Freedom of Information Act only if an agency "'reasonably foresees that disclosure would be harmful [to national security].'" Weaver & Pallitto, *supra* note 8, at 108 (alteration in original) (quoting Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies: The Freedom of Information Act* (Oct. 4, 1993)). In contrast, her successor, John Ashcroft directed agencies "to withhold information where there is a 'sound legal basis' to do so." *Ibid.* (quoting John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies: The Freedom of Information Act* (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

[10] Steven Aftergood, *The Secrets of Flight: Why Transportation Security Administration Guards Don't Have To Tell You What They Won't Tell You*, Slate.com, Nov. 18, 2004, http://www.slate.com/id/2109922 (last visited Aug. 30, 2007 ) (describing fact that certain federal regulations governing airport security have been classified as "sensitive security in-

new classification decisions are only increasing. According to the Information Security Oversight Office, the Government made 9 million new classification decisions in 2001, 11 million in 2002, 14 million in 2003, 15 million in 2004, 14 million in 2005, and a breathtaking 20 million new classification decisions in 2006. Declassification, on the other hand, has remained stagnant.[12]

This is not surprising. Secrecy, after all, is a tried and true strategy to evade accountability and, alas, sometimes to evade the law—a strategy reflected in the sheer number of state secrets privilege claims raised in recent years.[13] *Reynolds*' suggestion that courts should in some instances accept the Executive's privilege assertions without verifying for

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formation" and therefore may not be disclosed); *see also* Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97 (1988). As an example of how the "sensitive secure information" concept has been abused, in response to a Freedom of Information request for five Federal Aviation Administration warnings to airlines on terrorism in the months just prior to 9/11, the Transportation Security Association responded by claiming that they were "Sensitive Security Information" and refused to disclose them—even though the warnings were quoted in the 9/11 Commission report, the bestselling book in America at that time, and discussed at length in public testimony by high-ranking government officials. *See Testimony of Thomas Blanton*, *supra*, at 123.

[11] Editorial, *Injustice, in Secret*, WASH. POST, Feb. 21, 2005, at A26 (describing how one Justice Department lawyer urged dismissal of *United States* v. *Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005), on the basis of a secret argument, claiming that the "legal argument itself cannot be made public without disclosing the classified information that underlies it").

[12] *See* INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2006, at 22 (2007), *available at* http://www.archives.gov/isoo/reports/2006-annual-report.pdf; INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2005, at 15 (2006), *available at* http://www.fas.org/sgp/isoo/2005rpt.pdf (last visited Aug. 30, 2007).

[13] See Frost, *supra*, 75 FORDHAM L. REV. at 1939 ("The Bush Administration has raised the [state secrets] privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal [based on it] in ninety-two percent more cases per year than in the previous decade.").

themselves that the materials in dispute are in fact privileged has only facilitated that corrosive strategy. Worse, that decision was based on a false premise. The Court acceded to the Government's unchecked assertions because it was concerned that disclosure even to a judge alone could jeopardize national security. *Reynolds*, 345 U.S. at 10. This worry has proven to be unfounded. Since *Reynolds*, courts have frequently been called upon to assess claims regarding access to sensitive information under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) & (b)(1), the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1805, and the Classified Information Procedures Act, 18 U.S.C. App. 3. In each of these contexts, *in camera* inspection of classified material is routine. In light of what we now know about the tendency of the Executive Branch to over-classify information and the competency of the courts to review sensitive national security information, this aspect of *Reynolds* has become dangerous and anachronistic.

Finally, the disturbing post-decision history of the *Reynolds* case confirms the dangers of judicial self-abnegation and provides further reason to be wary of invoking the evidentiary privilege recognized in *Reynolds* to expand *Totten*'s unique and categorical bar on adjudication to new categories of claims. Dismissing a plaintiff's claim on the pleadings, before any discovery has been sought or produced, requires the court to speculate about what the plaintiff will need to prove his or her case and to rely on the Government's bare assertions that the claims will intrude on privileged material. As *Reynolds* demonstrates, when judicial review of such privilege claims is conducted in the abstract, without looking at the particular set of materials at issue, the opportunity for abuse of the privilege, distortion of the adversary process, and subversion of checks and balances is all too plain.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

KHALED EL-MASRI,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR *AMICUS CURIAE* SENATOR DICK MARTY, CHAIRMAN OF THE LEGAL AFFAIRS & HUMAN RIGHTS COMMITTEE AND RAPPORTEUR OF THE PARLIMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Council of Europe is an international organization of 47 member states in the European region, founded in 1949.[2] The most enduring legacy of the Council of Europe is the European Convention on Human Rights, adopted in 1950, whose implementation is ensured by the European Court of Human Rights.[3]

*Amicus curiae* Senator Dick Marty is the Chairman of the Legal Affairs & Human Rights Commission and Rapporteur of the Parliamentary Assembly of the Council of Europe ("PACE") on "Secret detentions & illegal transfers of detainees involving Council of Europe member states." In that role, Senator Marty has prepared two reports: *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*[4], dated June 12, 2006 (the "2006 PACE Report"); and *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*,[5] dated June 7, 2007 (the "2007 PACE Report") (collectively, the "PACE Reports"). Senator Marty has filed this brief in support of Mr. Khaled El-Masri's submission that there already exists extensive knowledge of the allegedly "secret" U.S. Extraordinary

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[1] The Solicitor General of the United States and the Petitioner have consented to the filing of this *amicus curiae* brief.

[2] For more details consult the Council of Europe's website at www.coe.int.

[3] *See* www.echr.coe.int. (the Court's website).

[4] *Available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

[5] *Available at* http://assembly.coe.int/Documents/WorkingDocs/doc07/edoc11302.pdf.

Rendition Program (the "Extraordinary Rendition Program" or "Program").[6]

The PACE Reports are based on information gathered from official government sources, intelligence agencies and agents, and various existing materials, *e.g.*, the analysis of thousands of international flight records obtained from different sources, including international air traffic control authorities.[7] No conclusions in the PACE Reports are based on single statements, and all statements have been confirmed by distinct independent sources.[8] It should be noted that individual sources were only willing to talk to the Rapporteur on the condition of anonymity. This willingness to guarantee PACE contacts strict confidentiality was also endorsed by the Legal Affairs and Human Rights Committee and communicated to Mr. Franco Frattini, Vice-President of the European Commission, so that he could notify the relevant ministers in EU countries.[9] These guarantees created an atmosphere of trust and enhanced the value of the Reports. Where possible, information was cross-checked in the European countries concerned, in the U.S., and through objective documents or data.[10] The PACE

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6 The 2006 PACE Report is referred to in the Joint Appendix at JA200-201, ¶ 20, but is not included in the Joint Appendix. The 2007 PACE Report was released after the filing of the Joint Appendix. We respectfully request that this Court take judicial notice of the PACE Reports, given that they are material to the determination of whether *certiorari* should be granted. *Papasan v. Allain*, 278 U.S. 265, 268 n.1 (1986) (noting that the Court can take notice of items in the public record in considering motion to dismiss); *see also Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (same).

7 2007 PACE Report at ¶ 12.

8 *Id.*

9 *Id*

10 *Id.*

Reports reflect a consistent concern for objectivity guided by a commitment to the values the Council of Europe has always worked to uphold.[11]

## SUMMARY OF ARGUMENT

The PACE investigation of the Extraordinary Rendition Program arose from a concern that violations of human rights were being perpetrated on European soil at the behest of the U.S. government. These investigations have confirmed and provided further details on the Extraordinary Rendition Program, through which the U.S. government has engaged in the illegal abduction, detention, and torture of private individuals (including petitioner Khaled El-Masri), in complete disregard of his due process rights.

The United States was founded on the fundamental principle that the power of the Executive is not limitless. Yet the U.S. government has hidden behind the state secrets doctrine in order to escape judicial accountability for its actions—although virtually nothing concerning the core of Mr. El-Masri's claims remains secret. As set forth below, PACE's investigation has revealed in considerable detail the facts and circumstances surrounding Mr. El-Masri's detention pursuant to the Extraordinary Rendition Program. Indeed, the relative ease with which the mechanics of this case have been revealed demonstrates that the application of the state secrets doctrine here is wholly unwarranted. Moreover, the U.S. has publicly admitted to the existence of the Program, as well as Mr. El-Masri's abduction, further discrediting the applicability of the state secrets doctrine in this case.

But this case is about more than just the application of the state secrets doctrine. The U.S. government should

[11] 2006 PACE Report at ¶ 18.

not be permitted to ignore the international community's concerns regarding the unfettered nature of the Extraordinary Rendition Program. International law exists by virtue of reciprocity and accountability. When a country disregards the law of nations, it relinquishes the moral and legal authority to claim its protections. By ignoring the overwhelming international consensus and arguing that individuals like Mr. El-Masri cannot seek redress through the court system when there are clear abuses under the Extraordinary Rendition Program, the U.S. government has effectively legitimized the use of similar tactics by its enemies abroad—thereby jeopardizing its overseas citizens and soldiers and undermining the credibility of its foreign policy. It follows that the Court should grant Mr. El-Masri's petition and allow him to present his case to the trial court (while at the same time protecting the legitimately secret aspects of the Program).

## STATEMENT OF FACTS

Mr. El-Masri, a German citizen, initiated this suit in the District Court for the Eastern District of Virginia to recover damages for injuries he suffered during an illegal abduction and detention that took place as part of the Extraordinary Rendition Program. Mr. El-Masri was held *incommunicado* for over five months but was never charged with any crime. Mr. El-Masri was released several months after his captors became aware that he had been captured solely on the basis of mistaken identity and that he was innocent of any crime or terrorist connection. Some time after his release on or around May 28, 2004, U.S. government officials admitted that it had, in connection with the Extraordinary Rendition Program,

detained Mr. El-Masri. The U.S. government further admitted that it had done so by mistake.[12]

The district court dismissed Mr. El-Masri's claims based on the government's invocation of the "state secrets privilege." *See El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006). The Fourth Circuit affirmed the district court's dismissal and its finding that the substance of Mr. El-Masri's claim could not be heard without revealing state secrets. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

Efforts by PACE, news agencies, and foreign governments have brought many of the critical details regarding Mr. El-Masri's illegal abduction and detention into the public domain. Prior to his detention, Mr. El-Masri had been under surveillance by German intelligence operatives, mainly due to his regular visits to an Islamic cultural center in his home town of Neu-Ulm, Germany.[13] Information collected by those German intelligence sources ultimately led to his arrest.[14] PACE fur-

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[12] Former German Foreign Minister Otto Schily testified to a German parliamentary committee that the CIA mistake was acknowledged to him by Daniel Coats, then the U.S. ambassador to Germany. *German Ministers Deny Helping U.S. Kidnap Terror Suspect*, DEUTSCHE WELLE (December 14, 2006) available at http://www.dw-world.de/dw/article/0,2144,2272797,00.html. German Chancellor Angela Merkel also publicly stated that American officials had admitted to her that Mr. El Masri's abduction had been a mistake. State Department Press Release, Press Availability with German Chancellor Angela Merkel, December 6, 2005, *available at* http://www.state.gov/secretary/rm/2005/57672.htm.

[13] Stefan Nicola, *Analysis: Germans Want to Question Tenet*, UPI (September 28, 2006).

[14] *Id.* The German external intelligence service, the BND, has also said that it knew about the American seizure and detention of Mr. El-Masri, as well as his rendition to and subsequent torture in Afghanistan. Stephen Grey, Elisabetta Povoledo, *Intelligence Officials*

ther learned that the CIA asked the Macedonian authorities to secure and detain Mr. El-Masri until he could be handed over to the CIA.[15]

The public record confirms the details regarding Mr. El-Masri's stay in Macedonia. In his affidavit, Mr. El-Masri testified that after he was questioned at the Macedonian border, he was taken to a hotel later identified, with the help of journalists of the German public TV station "ZDF" investigating in Skopje, as the Skopski Merak.[16] The Macedonian Ministry of the Interior has confirmed that Mr. El-Masri stayed at the Skopski Merak for 23 nights, checking out on January 23, 2004.[17]

In addition, the PACE investigation showed that the techniques used to interrogate Mr. El-Masri match those regularly employed by the CIA to interrogate terrorist suspects.[18] Mr. El-Masri's allegations—that his captors put a bag over his head, chained his hands to a belt, fastened headphones to his ears, clipped his nose, and fitted him with a diaper—are consistent with techniques used against other detainees of the Extraordinary Rendition Program.[19]

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*Arrested in Kidnapping*, INT'L HERALD TRIBUNE (July 7, 2006). *See also* 2006 PACE Report at ¶ 116.

[15] *Id.*

[16] El-Masri Aff. at ¶ 14.

[17] 2006 PACE Report at ¶ 109. *See also* Stefan Nicola, *New Evidence in the El-Masri Case*, UPI (June 26, 2006); *German Government Insists It Learnt of CIA Detention Case too Late*, AGENCE FRANCE PRESSE (June 23, 2006).

[18] 2006 PACE Report at ¶¶ 79 to 86 and 95.

[19] El Masri Aff. at § 30; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASHINGTON POST (December 4, 2005). Fellow detainees have reported similar experiences. *See, e.g.*, Craig Smith, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES (July 7, 2006).

Likewise, the details of Mr. El Masri's transport are well known. Mr. El-Masri was spirited to the airport at Skopje where he was boarded onto a waiting aircraft.[20] The PACE investigation has revealed that the aircraft registered with the ground staff and paid its route charge fees in an unusual manner; no passengers disembarked to enter the terminal building and cross into Macedonian territory.[21] The plane never taxied closer than one kilometer to the terminal.[22] A team of armed Macedonian security police formed a lookout nearby, under strict instructions to face away from the aircraft.[23]

Foreign judicial authorities and reporters have even determined the names of the rendition team members and the pilots tasked to fly the planes.[24] A Spanish reporter has compiled the names of people said to be involved in Mr. El Masri's abduction from sources in the Spanish *Guardia Civil*.[25] Spanish authorities, aware that the CIA frequently uses the island of Majorca as a logistics center for its flights, confirmed through hotel logs that the members of the rendition team were on the island.[26]

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[20] El Masri Aff. § 34, Exhibit A. Newsweek has also confirmed that flight plans confirm that a Gulfstream V and a Boeing 737 were operated by the CIA on flight paths consistent with Mr. El-Masri's story. Michael Hirsh, Mark Hosenball, John Barry, *Aboard Air CIA*, NEWSWEEK NATIONAL NEWS (February 28, 2005); *see also* 2006 PACE Report at ¶ 124.

[21] 2006 PACE Report at ¶ 124.

[22] *Id.*

[23] *Id.*

[24] John Goetz, Marcel Rosenbach, Holger Stark, *German CIA Arrest Warrants Strain Ties with USA*, BBC WORLDWIDE MONITORING (June 27, 2007).

[25] Mark Landler, *German Court Confronts U.S. on Abduction*, N.Y. TIMES (February 1, 2007) at A1.

[26] *Id.*; 2006 PACE Report at 125.

Thus, despite the professed secrecy of the Extraordinary Rendition Program, it is apparent that the identities of many of its agents can be, and have been, easily determined.

Mr. El-Masri was held at a base in Kabul, Afghanistan, until Secretary of State Condoleezza Rice ordered his release after learning that Mr. El-Masri had been detained on the basis of mistaken identity.[27] A few weeks later, on May 28, 2004, Mr. El-Masri was flown out of Kabul on a CIA-chartered Gulfstream aircraft to a military airbase in Albania called Bezat-Kuçova Aerodrome.[28]

The fact of Mr. El-Masri's illegal detention as well as his torture and interrogation has been corroborated by authoritative independent sources, including comprehensive investigations conducted by foreign legal and political authorities. In the three years following his arrest, Mr. El-Masri's case has been investigated and reported upon extensively, including by the Untersuchungsausschuss (Committee of Inquiry) of the German Bundestag and German prosecutors.[29] The PACE Rapporteur has confirmed that it is undisputed among the members of the Bundestag Committee of Inquiry that Mr. El-Masri's report is true.[30] The foregoing investigations have produced considerable insight into the organization and methodology of the CIA's "secret" Extraordinary Rendition Program. In addition, these investigations have created renewed public interest

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[27] NBC Investigative Unit, CIA Accused of Detaining Innocent Man—If the Agency Knew He Was the Wrong Man, Why Was He Held? (April 14, 2005) *available at* http://www.msnbc.msn.com/id/7591918/; *see also* 2007 PACE Report at § 276 n. 219.

[28] 2007 PACE Report at § 279. The aircraft was issued permission to enter European airspace for "flight movements for the needs of the CIA, USA." *Id.*

[29] *Id.* at § 278.

[30] *Id.* at § 289.

in the program. In 2007, German prosecutors issued international arrest warrants for thirteen suspected CIA agents for their activities in relation to Mr. El-Masri's disappearance.[31] It is extremely likely that as these investigations progress, more information regarding Mr. El-Masri's rendition specifically, and the Extraordinary Rendition Program generally, will be made publicly available.

Despite the U.S. government's assertion that Mr. El-Masri's claim implicates the state secrets doctrine, the basic premise of this case—that Mr. El-Masri was improperly detained pursuant to the Extraordinary Rendition Program—is openly acknowledged by the U.S. government. President Bush has admitted that the CIA operates the Extraordinary Rendition Program,[32] and CIA Director George Tenet has made public official statements about it.[33] Even the U.S. Department of Justice has

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[31] *Id.* at § 286.

[32] In a speech on September 6, 2006, President Bush stated, "[A] small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006 at ¶ 12 *available at* http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html. The White House Press Secretary has acknowledged that "Rendition is not something that began with this administration and it's certainly going to be practiced, I'm sure, in the future." Press Gaggle by Tony Snow, Feb. 23, 2007, *available at* http://www.whitehouse.gov/news/releases/2006/06/20060607-2.html.

[33] Written Statement for the Record of the Director of Central Intelligence Before the National Commission on Terrorist Attacks Upon the United States, Oct. 17, 2002; "Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States," Statement by George Tenet, former Director of Central Intelligence, March 24, 2004, available at http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm.

internally circulated a memorandum entitled "The President's Power as commander-in-chief, to Transfer Captured Terrorists to the Control and Custody of Foreign Nations."[34] Secretary of State Condoleezza Rice has also made various public statements, both about the Extraordinary Rendition Program generally[35] and about Mr. El-Masri specifically.[36]

## ARGUMENT

Given that the Extraordinary Rendition Program as a whole, and so many of the details regarding Mr. El-Masri's situation in particular, are in the public domain, it would be contrary to the purpose of the state secrets doctrine and fundamental legal principles to allow the U.S. government to shield its clearly wrongful acts on the basis of that doctrine. This reflexive invocation of the state secrets doctrine and the lower courts' accep-

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[34] *See* Nat Hentoff, *Sweet Land of Liberty*, THE WASHINGTON TIMES, Feb. 19, 2007.

[35] Secretary Rice said in 2005 that the rendition program was "a vital tool in combating transnational terrorism" to be employed when, "for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option." In those instances, she said, "the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." State Department Press Release, Remarks Upon Her Departure for Europe, December 5, 2005, *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

[36] State Department Press Release, Press Availability With German Chancellor Angela Merkel, December 6, 2005, *available at* http://www.state.gov/secretary/rm/2005/57672.htm (German Chancellor Angela Merkel expressed her satisfaction that "the American Government, the American Administration, has admitted that [Mr. El-Masri] had been erroneously taken"); Glenn Kessler, *Rice to Admit German's Abduction Was an Error*, WASHINGTON POST, A18, December 7, 2005; *see also* 2007 PACE Report at ¶ 276 n.219.

tance of it also threaten key U.S. foreign policy objectives, including national security and relationships with important allies.

## I. THE CIRCUMSTANCES SURROUNDING MR. EL-MASRI'S CASE HAVE BEEN REVEALED NOT ONLY BY THE PARLIAMENTARY ASSEMBLY, BUT ALSO AS A RESULT OF OTHER MULTI-NATIONAL INVESTIGATIVE EFFORTS PLACING THE RELEVANT FACTS SQUARELY IN THE PUBLIC DOMAIN

In addition to the PACE inquiry, and that of the Secretary General of the Council of Europe[37] a number of inter-governmental agencies, states, and non-governmental organizations ("NGOs") have conducted investigations into the Extraordinary Rendition Program. A review of these investigations provides substantial evidence of both the operation of the Program and the key details of this case.

For example, the European Parliament and its Temporary Committee of Inquiry looked into allegations

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[37] *See, e.g.*, Terry Davis, Proposal of the Secretary General of the Council of Europe, Follow-up to the Secretary General's Reports Under Article 52 ECHR on the Question of Secret Detentions and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies (SG/Inf (2006) 5 and SG/INF (2006) 13), Doc. No. SG (2006) 01, *available at* http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc. *See also* Opinion of the Council of Europe's European Commission for Democracy through law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transfer of Prisoners, Doc. No. CDL-AD (2006) 009, Opinion No. 363/2005 (March 17, 2006) *available at* http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp. Other relevant documents can be found on the Council of Europe's website at www.coe.int.

that the CIA had been operating its Extraordinary Rendition Program within the European Union.[38] The final report adopted by the European Parliament, issued in February 2007, mentions up to 21 well-documented cases in which victims were transferred through a European country or were residents of a European State at the time of their kidnapping,[39] and forcefully condemned this practice.[40] Numerous other investigations into Mr. El-Masri's allegations and into the Extraordinary Rendition Program generally have been undertaken by many entities, including approximately 30 countries,[41] the United Nations[42] and various

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[38] *See* European Parliament Decision Setting up a Temporary Committee on the Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. (B6-0051/2006), (Feb. 21, 2006), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B6-2006-0051+0+DOC+PDF+V0//EN.

[39] *See* Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)) Eur. Parl. Doc. AG-0020/2007 ¶42 (Jan. 30, 2007), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

[40] *See* European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)), Eur. Parl. Doc. P6_TA-PROV(2007)0032, ¶39 (Feb. 14, 2007), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf.

[41] *See* Council of Europe, Supplementary Report by the Secretary General on the Use of the Powers under Article 52 of the European Convention of Human Rights: Information Documents (June 14, 2006), http://www.coe.int/T/E/Com/Files/Events/2006-cia/.

[42] *See, e.g.*, Preliminary Findings on Visit to United States by Special Rapporteur on Human Rights and Counter-Terrorism, May 29, 2007, http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/50C0462CBA023716C12572EA00489271?OpenDocument ("[T]he Special Rapporteur concludes that his visit supports the sus-

NGOs.[43] The existence and substance of these investigations warrant the special attention of this Court.

That the perspectives of other States should be considered by every country was recognized by America's founders. Federalist Paper No. 63 notes:

> An attention to the judgment of other nations is important to every Government for two reasons: The one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy. The second is, that *in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.*

The Federalist No. 63 (emphasis added).

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picion that the CIA has been involved in the extraordinary rendition of terrorism suspects and possibly other persons. This conclusion is corroborated by the recent findings of the Human Rights Committee and Committee Against Torture in the cases of *Agiza v Sweden* and *Alzery v Sweden* in which Sweden was found to violate its human rights treaty obligations by handing over Mr. Agiza and Mr. Alzery to CIA agents in the course of their rendition to Egypt."); U.N. Human Rights Committee and Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture, May 18, 2006, http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf (directly charging to "cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture").

[43] *See, e.g.*, Amnesty International, *Below the Radar: Secret Flights to Torture and 'Disappearance,'* April 5, 2006, http://web.amnesty.org/library/Index/ENGAMR510512006; Human Rights Watch, *Ghost Prisoner: Two Years in Secret CIA Detention*, February 2007, http://hrw.org/reports/2007/us0207/index.htm.

## II. OTHER DEMOCRATIC TRADITIONS PROVIDE A RIGHT TO A FORUM FOR VIOLATIONS OF INTERNATIONAL LAW WITHOUT COMPROMISING NATIONAL SECURITY

Certain fundamental legal principles, including specific fair trial rights, have become part of international law and are enshrined in many documents, including the European Convention on Human Rights, whose court requires contracting states parties to provide a forum for the adjudication of fundamental human rights violations.[44]

The European Court of Human Rights has recognized the need for states to prevent the disclosure of certain information for national security reasons. Nevertheless, the European Court still requires the availability of some type of effective (judicial) remedy in cases involving national security and terrorism.

There is a well-established case-law of the European Court of Human Rights in this respect.[45]

In *Chahal v. United Kingdom*, a national security case involving the adequacy of the legal review of a deportation order, the court observed: "[T]he use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control

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[44] *See also*, PACE Report The United States of America and International Law, dated 8 February 2007, *available at* http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11181.htm.

[45] For an overview of the Court's case-law see Introductory Memorandum of Rapporteur Grebennikov, entitled "*Respect for Human Rights in the Fight Against Terrorism,*" document AS/Jur (2006), *available at* http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20(2007)%2014%20E%20PACE.pdf.

by the domestic courts whenever they choose to assert that national security and terrorism are involved."[46]

Failure to grant Mr. El-Masri a judicial forum isolates U.S. governmental conduct from review, and reveals the failure of the United States to abide by fundamental human rights norms that exist in virtually all European states.[47]

## III. THE DENIAL OF REVIEW TO MR. EL-MASRI WILL UNDERMINE U.S. INTERNATIONAL STANDING AND THE RULE OF LAW

As this Court has held, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). If the U.S. expects its citizens' human rights to be honored by foreign governments, it must treat citizens of other countries with the same level of respect for their rights. This is consistent with the international law principle of reciprocity, which requires that favors, benefits, or penalties that are granted by one

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[46] *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997), ¶ 131. Also, in *Tinnelly & Sons Ltd. et al. v. United Kingdom*, a case involving the awarding of work contracts requiring access to vital power supplies and public buildings in the main centers of Northern Ireland, the European Ct. of Human Rights ultimately found that the applicants' fair trial rights were disproportionately restricted. The Court noted "that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns . . . and yet accord the individual a substantial degree of procedural justice." *Tinnelly & Sons Ltd. and Others and McElduff & Others v. United Kingdom*, 27 Eur. H.R. Rep. 249 (1999), ¶ 78. *See also Fox, Campbell and Hartley v. United Kingdom*, 13 Eur. H.R. Rep. 157 (1991), and *Murray v. United Kingdom*, 19 Eur. H.R. Rep. 193 (1995).

[47] *See* PACE Resolution 1562 (2007) § 10 and PACE Recommendation 1801 (2007) § 3.

state to the citizens or legal entities of another state should be returned in kind.[48]

The U.S. cannot expect other countries to comply with and enforce international law within their spheres of influence if it does not require the same of itself. The U.S. advocates for the broad enforcement of fundamental rights for the benefit of its allies and its own citizens abroad. *See, e.g., Case Concerning U.S. Diplomatic and Consular Staff in Tehran, (United States v. Iran)* 1980 I.C.J. 3 at ¶¶ 23, 69 (May 24, 1980) (U.S. government sought and won reparations from the Islamic Republic of Iran for injuries sustained by kidnapped U.S. diplomatic personnel). Consistent with the principle of reciprocity, other countries expect the U.S. to enforce human rights within the realm of its authority. For example, the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning Guantanamo Bay in *The Queen on the Application of Abbasi & Anor v. Sec'y of State for Foreign and Commonwealth Affairs*, 2002 WL 31452052 [2002] EWCA Civ. 1598 (A.C.) (appeal taken from Q.B.D.), partly based on that court's expectation that the U.S. would ultimately comply with international law:

> What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. . . . *As is clear from our*

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[48] Robert Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986).

> *Judgment, we believe that the United States Courts have the same respect for human rights as our own.*

*Id.* at ¶¶ 66, 107 (emphasis added).

To the contrary, the U.S. government's actions have created a legal precedent for the arbitrary abduction, illegal detention, and torture of U.S. military and civilian personnel abroad. If an American civilian were to be subjected to extraordinary rendition by a foreign state, the U.S. government could not credibly protest. It would be equally futile for the U.S. to attempt to rally its allies, since the U.S. has reportedly denied the same rights to citizens from all over the world, including Germany, Mr. El-Masri's home country.

Foreign governments are already citing to the American example to justify abuses of international law. Malaysia's law minister said Malaysia's practice of detaining militants without trial was "just like [ ] Guantanamo Bay," emphasizing that he used "the equation with Guantanamo just to make it graphic [ ] that this is not simply a Malaysian style of doing things."[49] The Extraordinary Rendition Program provides similar precedent for foreign states.

The Extraordinary Rendition Program has also strained U.S. relations with its allies. The German authorities opened an official investigation into Mr. El-Masri's case in June 2004. The Munich state prosecutor Martin Hofmann is convinced that "[t]here's just no indication that [Mr. El Masri] is [lying]."[50] A German

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[49] Sean Yoong, *Malaysia Slams Criticism of Security Law Allowing Detention Without Trial*, ASSOCIATED PRESS, Sept. 17, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00).

[50] Georg Mascolo and Holger Stark, *The U.S. Stands Accused of Kidnapping*, Spiegel Online, February 14, 2005, http://www.spiegel.de/international/spiegel/0,1518,341636,00.html.

parliamentary committee of inquiry is also looking into Mr. El-Masri's allegations. Thomas Oppermann, chairman of the committee, has said that the "core of the story" was "probably true" but that some facts remained ambiguous because certain countries, including the U.S. and Macedonia, have prevented access to evidence.[51] In January 2007, the Munich prosecutor issued international arrest warrants for thirteen CIA agents it believes were involved in Mr. El-Masri's abduction and detention.[52] For ten of the agents, the district attorney's office in Munich filed international warrants with Interpol, and German officials have stated their intent to request extradition of these agents.[53]

A similar strain has been placed on Italian-U.S. relations with respect to the 2003 abduction and extraordinary rendition of the alleged terrorism suspect Osama

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[51] Lots of expenses, few results, Interview with Thomas Oppermann, Chairman of the investigating committee, German Parliament, http://www.bundestag.de/dasparlament/2006/28-29/kulissen/003.html.

[52] *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, Spiegel Online, January 31, 2007, http://www.spiegel.de/international/0,1518,463385,00.html.

[53] *See, e.g.*, John Goetz, Marcel Rosenbach and Holger Stark, *CIA Arrest Warrants Strain US-German Ties, Spiegel Online*, June 27, 2007, http://www.spiegel.de/international/germany/0,1518,490514,00.html., Michael Isikoff and Mark Hosenball, *Hunting the Hunters*, NEWSWEEK, March 29, 2007, http://www.msnbc.msn.com/id/17859632/site/newsweek ("The U.S. has on multiple occasions made clear that it will consider a request for extradition as an unfriendly act that would burden bilateral relations,' said a European official who requested anonymity owing to the sensitivity of the subject—a view confirmed by a senior American official."). Following Spiegel Online's June 27, 2007, report, there has been no information available in the public domain regarding whether or when the German government plans to petition for extradition of any of the agents for whom warrants have been issued.

Moustafa Hassan Nasr. Mr. Nasr was seized in Milan, allegedly by the CIA with the help of the Military and Intelligence and Security Service (SISMI). He was then allegedly sent to Egypt and turned over to Egypt's State Security Intelligence (SSI) where he was purportedly tortured and released in February 2007. Later that month, indictments were issued for 26 CIA agents and 5 SISMI officials for their alleged roles in Mr. Nasr's abduction. The U.S. refused to extradite the agents; they will be tried *in absentia* if the trial goes forward.[54]

In the case of Maher Arar, the Canadian abducted in New York and tortured in a Syrian prison, Canada allowed a special commission of inquiry access to all the necessary information, including certain documents that could not be made public.[55] The commissioner, a judge, and not the government became the arbiter of what was supposedly a "state secret." Mr. Arar ultimately received compensation and a formal apology from the Canadian Prime Minister.

On December 6, 2005, in response to a press inquiry about the Mr. El-Masri's allegations, Secretary Rice said: "Any policy will sometimes have mistakes and it is our *promise* to our partners that should that be the case, that we will do everything that we can to rectify those

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[54] Italian Judge Oscar Magi has currently suspended the trial until October 24, 2007 until the Constitutional Court of Italy rules on the Italian government's petition to dismiss all charges on the grounds of state secrecy. *See* Elisabetta Povoledo, *Kidnapping Trial of Operatives from the C.I.A. Delayed in Italy*, N.Y. Times (June 19, 2007). However, unlike the U.S., even if the Court decides to dismiss all the charges, they will still have reviewed the issue.

[55] *See* the Report of the Events Relating to Maher Arar—Analysis and Recommendations ADDENDUM, published in August 2007, *available at* http://www.ararcommission.ca; *see also* the Report of the Events Relating to Maher Arar—Analysis and Recommendations, published in July 2006, *available at* http://www.ararcommission.ca.

mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary *in American courts as well.*"[56] Contrary to Secretary Rice's statement, the claims by Mr. El-Masri in the U.S. court system have been shunted aside and dismissed *before* they were heard—a stark companion to the treatment of Mr. Nasr's claims in Italy and Mr. Arar's claims in Canada.

The failure of the judiciary to allow Mr. El-Masri to even attempt to prove his allegations sends an inappropriate message that the rule of law only needs to be respected when it suits the interests of the U.S. government.

## CONCLUSION

For the reasons stated above, Senator Marty respectfully requests that this Court grant a writ of *certiorari* to Mr. El-Masri.

Respectfully submitted,

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[56] Press Release, Press Availability With German Chancellor Angela Merkel, (December 6, 2005), http://www.state.gov/secretary/rm/2005/57672.htm (emphasis added).

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